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Why does exercising my freedom of conscience cost so much?
**– An analysis of sin tax in our current South African
constitutional dispensation.**

by

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Abstract

With its inception and promulgation into law, the Constitution of the Republic of South Africa,¹ (hereinafter referred to as the Constitution) has enshrined into law, rights to which citizens of the Republic are entitled to. These rights are listed in Chapter 2 of the Constitution (hereinafter referred to as the Bill of Rights) which contains a list of twenty-seven rights. These rights include amongst others, the right to equality,² human dignity,³ life,⁴ freedom and security of person,⁵ privacy,⁶ and for purposes of this dissertation, the right to religion, belief and opinion.⁷ The Bill of Rights applies to ‘all law’⁸ dictating that the application of the rights contained therein would naturally extend to tax law and all practices that are associated with tax law.

In this respect section 8(1) of the Constitution explicitly states that:

“The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

The Bill of Rights places an obligation upon all role players operating within the tax arena (i.e. tax policy makers) to effect tax practices that “respect, protect, promote and fulfil the rights in the Bill of Rights.”⁹

Crucial to the effective operation of the Bill of Rights is the inherent fact that the Bill of Rights was never intended to, nor does it operate in isolation from a variety of scenarios, practices or points of law that may be posed or developed over time, whether these be related to tax law or otherwise.¹⁰

In this regard, a variety of tax laws and practices have developed over the years, to the point that these tax practices are widely accepted and can be defined or referred to as ‘practices generally prevailing’.¹¹ These practices, although ever-changing are required

¹ Constitution of the Republic of South Africa, 1996.

² See section 9 of the Constitution, 1996.

³ See section 10 of the Constitution, 1996.

⁴ See section 11 of the Constitution, 1996.

⁵ See section 12 of the Constitution, 1996.

⁶ See section 14 of the Constitution, 1996.

⁷ See section 15 of the Constitution, 1996.

⁸ See section 8(1) of the Constitution, 1996.

⁹ See section 7(2) of the Constitution, 1996.

¹⁰ See section 7(3) of the Constitution, 1996.

¹¹ A ‘practice generally prevailing’ is defined in Chapter 2 of the Tax Administration Act (TAA), as a “practice which is set out in an official publication regarding the application or interpretation of a Tax Act”. For purposes of this dissertation, the prescribed definition as noted in the TAA is not explicitly

to be aligned with and constantly tested against the rights that are contained in the Bill of Rights and the purpose of the Constitution as noted in section 7(2). This is imperative in determining whether effect is actually given to the rights and values in the Constitution - the cornerstone of our democracy - and ensuring that these rights and values do not become redundant. Notwithstanding the traction gained by tax practices, albeit on an international scale or not, the expectation within the South African context is for tax practices or tax laws to operate harmoniously with the rights that are enshrined in the Constitution.

An investigation of international trends as well as domestic considerations, relating to sin taxes, resulted in the South African government implementing a number of tax levies similar to those levied on an international scale. One of the most contentious of these levies are sin tax levies. Sin taxes have existed not only within the South African tax realm but also in the international tax sphere for several years and have been levied on a variety of commodities.¹² As a form of excise tax –sin taxes are generally levied on alcohol and tobacco as well as on other seemingly undesirable lifestyle practices such as gambling. The main motivation for levying sin taxes, both internationally and within the South African context is mainly for the following reasons:

1. To address the negative externalities which stem from the excessive consumption of alcohol and tobacco; whilst
2. Generating revenue for the fiscus.

A reform of the South African tax system has seen a dramatic increase in the levying of sin taxes on alcohol in South Africa.¹³ The reform of sin taxes was set against the backdrop of the reasons stated *supra*.

Although noble in rationale, it is contended that sin taxes greatly inhibit those who voluntarily choose to consume alcohol and tobacco of their right to freedom of

intended and the term ‘practice generally prevailing’ is used loosely to describe the trend of imposing sin taxes.

¹² An exposition of the various products upon which sin taxes have been levied will be discussed in more detail in the following chapter.

¹³ In the address entitled *The South African Tax Reform Experience Since 1994* that was delivered at the Annual Conference of the International Bar Association, held on 24 October 2002, the Honourable Trevor Manuel presented a number of proposals to reform the South African Tax system. Amongst the proposals was the policy decision to increase excise taxes on tobacco and alcohol products to reflect a 50 per cent increase on the eventual retail price of the commodity.

conscience as set out in section 15 of the Constitution. Increases in sin taxes have a direct bearing on the prices of alcohol and tobacco, which results in consumers of alcohol and tobacco being significantly pressurized by the constant price increases of alcohol and tobacco. By using the South African tax system to levy and increase sin taxes, policy makers can be construed as ‘institutionally depriving’ those who have chosen to exercise their right to freedom of conscience as contained in section 15 from doing so freely.

This dissertation analyses the interplay between the constitutionally guaranteed right to freedom of conscience and the impact that the imposition and constant increases in sin taxes has thereon. This dissertation further scrutinizes the nature of sin tax levies against the backdrop of the current South African constitutional dispensation and comments on the problems associated with the excessive increases in sin tax, which is viewed as a mechanism of revenue generation for the South African fiscus. In this regard this dissertation includes an investigation of the practical challenges posed – particularly to low income earning communities- by the constant increase in sin taxes.

This dissertation also includes an analysis of the limitations clause as contained in section 36 of the Constitution. This analysis includes a discussion on the manner in which sin taxes can be construed as a limitation of rights and to this end includes the reasoning presented by various role players for the levying of sin taxes which includes *inter alia* a variety of medical and other socio-economic arguments. Recommendations, findings and/or justifications, where relevant, are considered in relation to the above.

Lastly, this dissertation considers whether the South African tax system is the correct vehicle for addressing the negative externalities which are associated with the excessive consumption of alcohol and tobacco, particularly considering the actual effects that sin taxes have on vulnerable subgroups (i.e. low income earning communities). This is discussed in Chapter 4 of this dissertation.

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I would also like to thank Prof. T Legwaila for the motivation, albeit unbeknown to him that he proved to be during the flesh -ling years of my undergraduate degree and now throughout the course of this degree. Undertaking a career in tax law was largely attributed to the inspiration that I have drawn from the many milestones that he has accomplished in his career. It was through this motivation that I have come realise the truth in the well-known adage that “Yes, black child it’s possible”.

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To Golden Sesana, thank you for your unwavering support and cheers. If I were to express my gratitude, words alone would fail.

And finally, to the friends that I met during my academic life that have now become family, to my immediate family, ba ha Moikanyang le ba ha Mashile, I would like to extend my deepest gratitude for the role that you have played in my studies. Kea Leboga. To ausi Phaladi Magongoa kea leboha, kea leboha, kea leboha.

To Jehovah God be the glory today, tomorrow and forever.

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Chapter 1 - Introduction

1.1 Overview

As alluded to in the abstract of this dissertation, sin taxes have been around for several years. One of the primary reasons for levying sin taxes was and still is the goal of many governments to discourage their citizens from engaging in undesirable behaviour. Sin tax - is a colloquial term that refers to a certain type(s) of excise taxes.¹⁴ Sin taxes have been acquainted with South African tax law for several years and formed part of the South African tax structure with the ushering in of the interim Constitution in 1994 and the final Constitution in 1996. The past several years have seen the South African government steadily increase sin taxes. Since 1994, the nominal tax¹⁵ on tobacco and alcoholic beverages is said to be increasing by nearly 25 per cent each year and accounts for inflation.

Numerous medical and financial arguments have been advanced to justify and criticize the levying of sin taxes.¹⁶ Medical problems such as lung cancer, emphysema, alcohol poisoning and socio economic challenges such as domestic violence and excessive poverty have been identified as some of the negative externalities associated with alcohol and tobacco abuse.¹⁷ These negative externalities attributed to the excessive consumption of alcohol and tobacco have placed a great burden on health care systems

¹⁴ Excise taxes, i.e. sin taxes are levies charged on specific goods and services which are either produced, sold or delivered within a country. These duties are typically based on the physical characteristics of the product. See Croome et al *Tax Law: An Introduction* (2013) 6-7.

¹⁵ A nominal tax rate is a tax rate which is curtailed to government goals and may not account for factors such as inflation.

¹⁶See <http://www.sajcn.co.za/index.php/SAJCN/article/view/277/597> (accessed 2 June 2017) and <http://www.eclb.co.za/cms/wp-content/uploads/Social-and-Economic-Impacts-of-Alcohol-Absue-in-EC-2010.pdf> (accessed 2 June 2017).

¹⁷n 16 above.

worldwide. Additionally, an article published in the National Journal¹⁸ concluded that revenue-generating reasons are probably the primary reasons for levying sin taxes.¹⁹ Additionally, moral reasons have been advanced in support of the levying and increases in sin taxes. Consequently, as seen from the arguments mentioned *supra*, the levying of sin taxes are envisaged to serve as a deterrent - as increases in the price of alcohol and tobacco should logically make these commodities less accessible and thereby discourage and curb excessive consumption patterns and the negative externalities that follow thereon. A causal nexus is evident between the excessive consumption of tobacco and alcohol and the variety of medical and socio-economic problems mentioned above. This nexus is discussed in Chapter 3 of this dissertation.

The excessive consumption of alcohol and tobacco and the resultant medical conditions associated thereto (i.e. lung cancer, emphysema, alcohol poisoning) continue to burden health care departments internationally and in South Africa. There is arguably a direct link between the increasing revenue allocated to health care and the negative externalities that are caused by the excessive consumption of alcohol and tobacco. The increase in government revenue that is allocated to healthcare is partly used to provide medical assistance to persons who have become incapacitated due to the excessive consumption of alcohol and tobacco and are thus unable to do so themselves.²⁰ The increase in government expenditure allocated to healthcare as a result of the excessive consumption of alcohol and tobacco, therefore necessitates the various medical arguments in support of the levying of sin taxes – further fuelling the debate for an increase in sin taxes

Within the South African context, an endocrinologist, Dr Sundeep, in an article published in the Daily Maverick, advanced one of these medical arguments.²¹ The cited article acknowledges that a range of complications that are caused by non-communicable diseases²² including those associated with excessive alcohol and

¹⁸ The National Journal is a research and advisory services company based in Washington D.C. The National Journal hails publication of a variety of “policy brands research for government and business leaders”.

¹⁹ Bennet “Proposed Sin Tax on cigarettes sparks hope for preschool” 2013 *National Journal* (NJ).

²⁰ See <https://www.dailymaverick.co.za/article/2017-02-06-health-e-our-health-system-is-collapsing-under-the-burden-of-chronic-disease/#.Wd4eVxFL4g> (accessed 2 June 2017).

²¹ n 20 above.

²² Granted many other socio-economic and health effects – save for those associated with excessive alcohol and tobacco consumption - have put a burden on the healthcare sector. This dissertation, however, investigates the effects that excessive alcohol and tobacco consumption have had on the society at large

tobacco consumption have become “overwhelming” and the health sector is becoming further “under resourced”.²³ The cited article²⁴ further acknowledges that the imposition of taxes on alcohol and tobacco by the government can be seen as government’s way of assisting those who are less inclined to assist themselves due to addiction. Furthermore, the article acknowledges that the noticeable decline in tobacco and alcohol consumption over the past decade is attributable to legislative measures – such as sin taxes - that have targeted the “affordability, availability and acceptability” of alcohol and tobacco.²⁵ Notwithstanding these positive results, the article urges that revenue generated from sin taxes levies be “put back into the healthcare sector to fund poorly resourced hospitals and public health interventions aimed at the prevention of non-communicable diseases”.²⁶

Conversely, arguments have been put forward in opposition of sin taxes referencing to the regressive nature of sin tax and the fact that sin taxes can no longer be seen to effectively discourage the excessive consumption of alcohol and tobacco, contrary to commentary suggested in the article cited *supra*.²⁷ Various academics argue that the secondary reason for levying sin taxes has become largely redundant, seeing as alternative consumption patterns and increased negative externalities continue to surface.²⁸ Arguments such as those addressed in the article²⁹ *supra*, suggest that the consumption of tobacco and alcohol has not decreased in proportion to the consistent increases in sin taxes. In fact, those who are prone to excessively consume alcohol and tobacco often turn to the consumption and addiction of alternative substances that are cheaper (i.e. *nyaope*, *wonga*, illegal cigarettes and home brewed alcohol). Ardent consumers of alcohol and tobacco tend to be less price sensitive.³⁰ Juxtaposed to price

(i.e. socio-economic externalities associated with excessive alcohol and tobacco consumption) and on the health care sector.

²³ n 20 above.

²⁴ n 20 above.

²⁵ n 20 above.

²⁶ n 20 above.

²⁷ n 20 above.

²⁸ Hoffer “Sin Taxes: Size, growth and the creation of Sindustry” 2013. See <https://www.mercatus.org/publication/sin-taxes-size-growth-and-creation-sindustry> (accessed 2 June 2017).

²⁹ n 20 above.

³⁰ National Treasury “A review of the taxation of alcoholic beverages in South Africa – A discussion document” (2014) 8. See <http://www.sars.gov.za/AllDocs/LegalDoclib/DiscPapers/LAPD-LPrep-DP-2014-02%20-%20Discussion%20Paper%20on%20a%20Review%20of%20Taxation%20of%20Alcoholic%20Beverages%20in%20RSA.pdf> (accessed 2 June 2017).

sensitive consumers of alcohol and tobacco who have rather taken to brewing their own alcoholic beverages and consuming illegal cigarettes and/or tobacco substances (as listed *supra*), as opposed to buying pre-mixed alcoholic drinks and consuming legal tobacco and tobacco products.

The contradictory arguments presented in this overview to chapter one, regarding the moral, medical and financial aspects favouring and negating the levying of sin taxes, necessitates regular due diligence of sin taxes from policy makers. It would be prudent for policy makers to, firstly determine whether the practice of levying sin tax is in essence still constitutionally valid and whether the rationale that gave rise to the levying of sin taxes retains legitimacy. Upon consideration of the positive and negative results of the practice of levying sin taxes it would also be prudent for policy makers to objectively test whether the practice of levying sin tax is in fact an effective tax mechanism to address the negative externalities associated with the excessive consumption of alcohol and tobacco - if that, in fact is still a reason for the practice of sin tax levies. Furthermore, role-players who are mandated to enact legislation and those who are mandated to collect revenue therefrom should regularly test whether the objectives for enacting the legislation and the manner in which the derived revenue is effectively utilised to address and re-dress the negative externalities arising from the excessive consumption of alcohol and tobacco.

Noteworthy developments in case law (as will hereinafter be discussed in this dissertation) evidence how regular constitutional due diligence is undertaken with respect of aspects that relate to rights contained in the Constitution. Although the case law discussion that follows canvasses the legality of the consumption of a substance, it is worth noting the manner in which South African courts re-visit past judgments in order to give effect to constitutionally guaranteed rights - when it becomes evident that guaranteed rights are or have been encroached upon, alternatively, when the need for such development arises.

In March 2017, the Western Cape High Court gave clarity regarding the manner in which conflicts between constitutionally guaranteed rights such as ones right to freedom of conscience and societal opinions are to be dealt with. In *Prince v President of the Law Society of the Cape of Good Hope*³¹ the Constitutional Court ruled that the

³¹ 2002 2 SA 794 (CC).

use of marijuana - albeit justified in the circumstances of the applicant at the time given that his religious affiliation necessitated the use thereof - was illegal. This judgment ultimately prevented the plaintiff from exercising his freedom of conscience and/or religion. After the Western Cape High Court considered a careful balance between constitutionally guaranteed rights and societal opinions and norms a review of the penned judgment by the Constitutional Court resulted in the partial legalisation of marijuana, specifically focusing on the private use thereof.³²

A discussion of the *Prince* case is included chapter 2 of this dissertation.³³ The principles that are derived from this case highlight that practices and past decisions that are either legislated or pronounced can be modified when constitutionally and validly challenged. This is indicative of the fact that tax policies may also be revised when required.

This dissertation includes a case study of the Philippines as an example of the effective manner in which to levy sin tax so as not to unduly burden the poor and effectively retard efforts for growth and equity. This case study, however, does not and should not be construed as negating the fact that sin taxes and the increase thereon affects those in largely affluent income earning communities. It is, however acceptable, admittedly so, that sin taxes and the increases thereon do not affect those in largely affluent income earning communities to the same extent as these levies and increases thereon affect those in poorer or lower income earning communities – who choose to and are prone to excessively consume alcohol and tobacco. However, the scope within which this dissertation discusses sin taxes, largely relates to the effects that excessive increases in sin taxes has on low income earning communities as ardent consumers of alcohol and tobacco; and the potential burden that this has placed on the South African government.

³² Case law references to the *Prince v President of the Law Society of the Cape of Good Hope* case (n 31) should not be construed as inducing a view on the usage of marijuana. Rather the *ratio decidendi*, which led to the outcome of the case forms a part of the scope within which the case is considered and discussed in this dissertation.

³³ Granted the *Prince* case relates to the legality of a substance, however, the manner in which the Western Cape High court reached its judgment which resulted in the partial legalisation of the substance is evidence of the need to regularly re-visit decisions/practices to consider whether these can still retain constitutional validity.

1.2 Purpose and research questions

In light of the above arguments and case law discussed, the following questions are considered in this dissertation:

1. What is the impact of the taxation of alcohol and tobacco on one's freedom of conscience? The exploration of this question will focus specifically on the interplay between the Bill of Rights and the worldwide phenomena of sin tax; and discusses the application of section 36 of the Constitution to the tax practice of sin tax;
2. The success rate that sin taxes have actually achieved in addressing socio-economic issues and negative externalities associated with the excessive consumption of alcohol and tobacco, with a particular focus on low income earning communities; and
3. Is the South African taxation system the most appropriate vehicle to address socio-economic issues and negative externalities associated with the excessive consumption of alcohol and tobacco?³⁴

1.3 Methodology

This dissertation includes an analysis of the reasoning that brought about the introduction of sin taxes into the South African taxation system. This dissertation further investigates the relevance of the Bill of Rights and the limitation clause as contained in section 36, to sin taxes. Lastly, this dissertation includes a case study of the manner in which the Philippine government has successfully navigated the correct manner in which to levy sin taxes; and further discusses the lessons that the South Africa tax system can absorb from the manner in which sin taxes are levied by the Philippine government - as a means of addressing the regressive effects of constant increases in sin taxes evidenced in low income earning communities in South Africa.

1.3.1 Scope of the study

Excise taxes are levied on all types of undesirable behaviour.³⁵

³⁴ In this respect a discussion of the regressive nature of sin tax will be discussed with respects to the noticeably adverse effects that sin taxes have had on low income earning communities.

³⁵ Undesirable behaviour is a term which denotes instances where a person "acts in a way that is not socially or morally acceptable and in essence acts in a way that violates social norms" as defined by

The scope of this investigation relates solely to sin taxes and the role that sin taxes play within the South Africa taxation system. The investigation of the above posed research questions is made with reference to the right to freedom of conscience as set out in section 15 of the Bill of Rights. As a result, constitutional references made in this dissertation are restricted to section 15 and section 36 of the Constitution.

This dissertation contains a case study of the Philippines which focuses on aspects that relate to the successful levying of sin taxes and the manner in which revenue generated from sin taxes by the Philippine government is effectively utilised.

1.3.2 Structure

This dissertation comprises of five chapters, each chapter makes reference to and is related to the central theme of this dissertation.

Chapter 2 discusses the general history of sin taxes, on an international scale and also discusses the domestic reasons for the levying of sin taxes within the South African context. More specifically, Chapter 2 discusses the South African excise tax regime and legislative amendments that are proposed thereto. Additionally, Chapter 2 includes a discussion on the revenue generation that has been accomplished by sin taxes in South Africa and the propensity to do so in future and includes a discussion of the current sin tax structure in South Africa.

Chapter 3 of this dissertation discusses the application of the Constitution to sin taxes, which is essentially a discussion of the application of section 36 of the Constitution to the right set out in section 15. The discussion relating to section 36 includes case law that underpins the courts' interpretation of section 36 and includes an enquiry into the existence of a constitutional basis in limiting ones right as set out in section 15 by the levying of sin taxes. This enquiry includes both domestic and international research related to sin taxes and applies this research to the application of section 36 of the Constitution.

Sin taxes are construed as a favourable mechanism for discouraging the excessive consumption of alcohol and tobacco. Given this analogy, it is not inconceivable to draw

<https://psychlopedia.wikispaces.com/unconventional+and+undesirable+behavior> (accessed 23 September 2017). Therefore "undesirable behaviour" can relate to the excessive consumption of tobacco and alcohol as well as excessive gambling habits which results in negative externalities for both those who excessively consume 'reprehensible' substances such as tobacco and alcohol.

the inference that the constant increase in sin taxes levies would make alcohol and tobacco less accessible. However, evidence has shown that increases in sin taxes has not necessarily translated into discouraging the excessive consumption of alcohol and tobacco.³⁶ The Philippine government is evidence that a direct relationship between the increase in sin taxes and discouraging undesirable behaviour is in fact possible. Furthermore, the Philippines is evidence of an effective manner in which sin tax levies may be levied in the correct manner so as to strike the correct balance between government revenue generating goals as well as discouraging negative consumption patterns. Thus, Chapter 4 of this dissertation focuses on the manner in which sin tax is levied in the Philippines and how the revenue derived from sin tax levies is channelled in such a manner that undesirable behaviour is successfully curbed. Additionally, Chapter 4 discusses the lessons that the South African sin tax model could mirror in order to promote success of sin tax levies both from a tax policy perspective as well as from a social impact perspective, in a manner similar to that achieved by the Philippine government. Thus, Chapter 4 discusses the manner in which initial policy considerations that gave rise to the levying of sin taxes and the implementation of the South Africa sin tax model can be given greater effect.

In this regard, contrasts are drawn between both the Philippine and the South African sin tax models. The contrasts between the Philippine sin tax model and the South African sin tax model are drawn in a manner so as to ascertain whether the South African tax system is adequately addressing socio-economic challenges and negative externalities associated with the excessive consumption of alcohol and tobacco. More specifically, contrasts drawn in this regard are drawn in order to determine whether policy considerations which saw the inception of sin taxes in South Africa are viable and whether sin tax policy are found upon internationally recognised tenets of taxation.

Chapter 5 discusses findings and recommendations based on the discussions advanced in each preceding chapters. Chapter 5 also includes a discussion on whether the South African tax system should be burdened with rectifying socio-economic challenges and

³⁶National Treasury 'Budget Review' 2014 (Chapter 5). See <http://www.treasury.gov.za/documents/national%20budget/Budget%20Review%201994.pdf> (accessed June 8 2017); and Tax Predictions for 2017's Budget; Raising Revenue in a disruptive World, <https://www.sablog.kpmg.co.za/2017/02/tax-predictions-2017s-budget-raising-revenue-disruptive-world/> (accessed 8 June 2017).

associated negative externalities or whether this responsibility should be that of other State departments such as the South African health care department. To the extent that the South African taxation system – by means of sin tax policies – should be burdened with the responsibility afore-mentioned, recommendations regarding improving the South African sin tax model are discussed. These recommendations are particularly discussed concerning the manner in which revenue generated from sin taxes should aptly be utilised.



Chapter 2 - The history of sin taxes and its introduction into the South African tax system

2.1 Overview

As a state-sponsored tax – sin taxes - were intended to alter the consumption patterns of consumers who wilfully and excessively consume alcohol and tobacco, to their detriment as well as the detriment of the State. Sin tax is essentially seen as a tax on behaviour which is used as a tool by various governments to positively influence consumption patterns of consumers. Sin tax levies are also seen as a means of raising revenue for governments whilst in the process of positively altering consumption patterns.³⁷ This two-fold reasoning is the justification put forward by many governments for the levying of and annual increases in sin taxes.

Sin taxes are largely selective in nature and could be interpreted as being *prima facie* discriminatory. Sin taxes effectively decrease the disposable income of consumers who opt to exercise their section 15 rights by consuming alcohol and tobacco. As such, it could be inferred that the economic and/or disposable income of consumers who do not excessively consume alcohol and tobacco is not as adversely affected by the increase in sin tax levies. As such consumers who do not consume alcohol and tobacco can arguably be said to have increased disposable income, given that they are not adversely affected by the increasing prices in alcohol and tobacco – which results from sin tax levies.

The earliest record of the imposition of sin tax was in Pennsylvania by Alexander Hamilton in the year 1791.³⁸ The following discussion summarises the various types of sin taxes that have been levied on an international scale, in countries such as France, India, China and Britain. The following exposition on the sin taxes levied in these countries evidences a holistic international view of sin taxes and the predominantly motivating reasons for sin tax levies, which also serves as the rationale behind the introduction of sin taxes by South African policymakers.

³⁷ Talbot “Fat tax as an alternative tax in South Africa” 2012 *International Business & Economics Research Journal (IBERJ)* 1281 (Altman, 2009).

³⁸ Talbot “Fat tax as an alternative tax in South Africa” 2012 *International Business & Economics Research Journal (IBERJ)* 1281 (Altman, 2009).

2.2. The international history of sin tax

2.2.1 Case study – France and India

Historically, salt was viewed as a valued commodity, essential for preservation and provision purposes. Salt was viewed as a necessary and lucrative commodity used by the French and Indian population. Realizing an opportunity for revenue generation, both the French and Indian governments were amongst the first to introduce an excise tax on salt. ‘Salt tax’, as it was called, was familiarised with the Indian taxation system in the 18th century.³⁹ The French government, however, had initially introduced the French *gabelle* as an indirect tax levied on produce from farming and industrial commodities. In the 14th century the French government revised the *gabelle* to be a tax levied solely on salt, the *gabelle* was levied until 1946 and was levied in proportion to the amount of salt that an individual purchased.⁴⁰

Given the lucrative nature and importance of salt to both the French and Indian people, the salt tax attracted much opposition, incited much anger and stood as one of the most opposed and grossly unequal forms of revenue generation in both French and Indian history. As a result, the French *gabelle* was repealed by the French National Assembly in 1790 and was finally abolished in 1945 because of France's liberation from German colonialism.⁴¹ The salt tax remained largely untainted in 1858 when the British colony took control of India. Mass opposition against salt tax was advocated by the likes of Mahatma Gandhi who regarded salt as one of the greatest necessities in life. This stern opposition resulted in the abolishment of the salt tax by the Prime Minister of the Indian Interim Government in 1946.⁴²

2.2.2 Case Study - China

The salt tax levied by the Chinese government existed until 2014. Given that the ‘salt tax’ was levied by the Chinese government as early as 119 B.C., the abolishment of the salt tax in 2014 renders China the “world’s oldest salt tax monopoly in the world”.⁴³ As in the case of the French and Indian government, the Chinese government viewed the

³⁹ n. 37 above.

⁴⁰ See <https://www.britannica.com/topic/gabelle> (accessed 2 June 2017).

⁴¹ n 38 above

⁴² n 38 above.

⁴³ Adshead “Pang China: The rise of the East in the world history” 2004.

lucrative and necessary nature of salt as an opportunity for revenue generation. By the 19th century, more than half of the Chinese government's tax revenue was derived from salt taxes. Largely, the salt tax contributed greatly to state coffers of the sovereign state during the 20th century.⁴⁴

2.2.3 Case study – British Colonies

A revenue generating opportunity was identified by the British colonies in the form of a tax on tea. As a result of the prevalent preference for tea within the various British colonies and was seen as an attempt to generate revenue for the monarchy. As a result, the Tea Act was passed which dictated that the British government had the exclusive right to control all trade in tea, to determine the prices thereof and any corresponding levies related to tea. Similar to the revolt staged by both the Indian and French people against the salt tax, the British population that was adversely affected because of the tea tax, staged the revolutionary Boston Tea Party in 1773.⁴⁵

The examples discussed *supra* are evidence of the approach that many countries have taken towards the levying of sin taxes. It is evident that revenue-generating reasons are a motivating factor for the levying of sin tax. Additionally, sin taxes are levied on the consumption of products that are viewed by governments to be popular or lucrative (when reviewing general consumption patterns). Notwithstanding this, the above examples highlight the disturbing reality of sin tax; namely the regressive nature thereof. Salt was a commodity that was used by both the rich and the poor. By taxing this commodity, it can be inferred that low-income earners were adversely affected, even more so than the richer population. As such, the same could be said regarding sin taxes, namely that the choice of some to purchase alcohol and tobacco as opposed to their utilising their disposal income for more meritorious household expenditure, could adversely affect those in low-income earning communities. Sin taxes potentially increase the price of the commodity upon which they are levied. Suffice to infer that if the tax base upon which sin taxes are levied does not increase simultaneously to sin tax increases, sin taxes could within this context could be viewed to be largely regressive.⁴⁶ This inference is based on the widely accepted preposition that taxes should be levied

⁴⁴ Adshead "Pang China: The rise of the East in the world history" 2004.

⁴⁵ Thorndike "A Tax Revolt or Revolting Taxes" (2005) *Tax Analysts*. See <https://taxfoundation.org/tax-subsidies-and-boston-tea-party/> (accessed 3 June 2017).

⁴⁶ See Stiglingh M et al *Silke: South African Income Tax* (2016) 1197 as respects the concept of a regressive tax or tax rate.

on a growing tax base, which would arguably result in a direct increase in collected revenue. Sin taxes – particularly within the context of lower income earning communities - cannot be said to be levied on a growing tax base, *per se*. The regressive nature of sin tax is explored in more detail in the discussion to follow.

The abovementioned examples of the manner in which excise taxes have been levied in the past, is aptly described by the analogy made by the late H.C. Simons, an American professor of public finance. According to Simons, the ‘elect’ noticed that the ‘damned’ consumed a significant amount of certain goods, liquors and other commodities. The taxation thereof would properly discourage certain consumer patterns and would assist in carrying the tax burdens that such consumption behaviour places on the government and government resources.⁴⁷ Certain arguments have been made to the effect that excise taxes should be charged on an *ad valorem* basis, which is an excise tax that is charged based on the value of an imported or manufactured product. Notwithstanding these, many excise tax regimes – including South Africa – levy excise taxes as specific duties that are imposed at a specific monetary charge per unit.⁴⁸

It is therefore clear that excise taxes are distinguished by their “selectivity in coverage, discrimination in intent and some form of quantitative measurement in determining tax liability”.⁴⁹ Sin taxes are categorised within the excise tax regime, thus warranting a discussion of the intricacies of an excise tax regime, more specifically a discussion of the excise tax regime within which the South African sin tax model operates.

2.3 The South African excise tax regime

As is the case relating to the manner in which excise taxes are levied, the South African excise tax regime has two distinct types of excise taxes. Firstly, there are excise taxes that are imposed on producers and importers of certain goods. As will be illustrated in the following chapter, these excise taxes are included in the price that is eventually charged to the end consumer. The second type of excise tax is an excise tax that is imposed at the end consumer’s point of sale.⁵⁰

⁴⁷ Terra *Tax Law Design and Drafting* (Vol 1) 1.

⁴⁸ Terra *Tax Law Design and Drafting* (Vol 1) 5.

⁴⁹ Terra *Tax Law Design and Drafting* (1996) 3.

⁵⁰ An example of this type of excise tax is Value-added tax, which is a tax paid on the consumption of goods or services and is charged a rate of 15 per cent, effective 1 April 2018. A discussion of the mechanism of the Value-added tax regime is not within the scope of this dissertation and is therefore not considered any further.

In line with international standards, the South African government enacted the Customs and Excise Act⁵¹ that provides for the levying of customs and excise duties and also certain other taxes such as the Road Accident Fund levies, environmental levies, fuel levies and air passenger levies. The Customs and Excise Act⁵² further prescribes an extensive system of customs control that focuses on the import and export, manufacture and use of goods. These customs controls serve to impose legislative restrictions on the import and export of products into and out of regulated ports of entry of the Republic of South Africa. According to the South African Revenue Service, the Customs and Excise Act⁵³ is particularly beneficial in combatting the smuggling of counterfeit and other illicit goods into and out of South Africa.⁵⁴

Although the Customs and Excise Act was amended on numerous occasions in order to 'keep pace with the new approaches and to soften and modernise the system', the basic structure of the Customs and Excise Act remain unchanged and still mirrors the rigid features which were incumbent during that time when the Customs and Excise Act was written. It was noted that a reform of the Customs and Excise Act was necessary, not only to give effect to internationally recognised instruments such as the Revised Kyoto Convention, but also to establish a clear, logical legislative framework that would be equivalent to many other derivative legislative instruments that rely for their implementation on customs control.⁵⁵ This legislative review, resulted in the division of the Customs and Excise Act into three separate items of legislation which would eventually replace the Customs and Excise Act, in its entirety. The three sections are as follows:⁵⁶

⁵¹ No. 91 of 1964. Further, note that the following discussion pertaining to the aforementioned Act is made as an exposition of sin taxes in the South African context. The following discussion of the aforementioned Act is made largely due to the reason that sin tax levies fall within the realm of customs and excise, thus necessitating a discussion of the aforementioned Act.

⁵² n 51 above.

⁵³ n 51 above.

⁵⁴ SARS, Memorandum on Objects of Customs and Excise Amendment Bill, (2013).

⁵⁵ n 54 above.

⁵⁶ Due to the fact that legislative drafting is a grave task, it was decided that the legislative drafting of these three sections would be undertaken in two phases, namely the completion or drafting of the first two sections and secondly to draft the Excise Bill. SARS Memorandum on Objects of Customs and Excise Bill, 2013, see <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2013-04%20%20Memorandum%20Objects%20Customs%20and%20Excise%20Amendment%20Bill%202013.pdf> (accessed 1 November 2017).

1. Customs Control Act - which is envisaged to establish a system for the customs controls of all goods imported into and exported out of the Republic;
2. Customs Duty Act - which provides for the imposition, assessment and collection of customs duty on goods imported into the Republic. It is contended that the Customs Duty Act may in future be utilised in order to impose, assess and collect customs duties from goods exported out of the Republic.
3. Excise Duty Act - that will provide for the imposition, assessment and collection of excise duties, fuel levies, Road Accident Fund levies and environmental levies on goods imported into or manufactured in the Republic, as well as the collection of air passenger tax.

Suffice to say that sin tax would operate within the parameters of the Excise Duty Act. Following, is a discussion of the manner in which sin tax – an extension of the excise tax regime- was assimilated into the South Africa taxation system and has developed over time.

2.3.1 Sin Tax in South Africa

In 1994, the interim South African government sought to generate additional revenue and align the South African excise duty system with ‘international tax practice’.⁵⁷ In the Budget Review delivered in 1994, the Director General of Finance, Estian Calitz stated adjustments in excise are to be done on an ‘*annual*’⁵⁸ basis so as to ensure that the yield (revenue) derived therefrom ‘keeps pace with the general level of price increases’⁵⁹ yielded on an international scale. Evidence of this intention can be seen in the annual increases in sin taxes, which are a feature of each budget speech delivered by standing Ministers of Finance at the time.⁶⁰

2.3.2 Excise taxes in South Africa and revenue generation

Revenue potential of sin tax increases was aptly shown by the economic data collected with respect to sin tax revenue generative potential. The 1994 Budget Review stated that adjustments in excise taxes (including sin taxes) would yield in the excess of R525

⁵⁷ See <http://www.treasury.gov.za/documents/national%20budget/Budget%20Review%201994.pdf> (accessed 8 June 2017).

⁵⁸ [Own emphasis]

⁵⁹ n 50 above.

⁶⁰ Numerous article commentary is provided post the delivery of the budget speech in Parliament relating to increases in sin taxes. See <https://mg.co.za/article/2016-02-24-sin-taxes-prepare-to-pay-more-for-cigarettes-and-booze/> (accessed 5 June 2017).

million in a full calendar year and R350 million for the remainder of that financial year, as at 1994.⁶¹ Revenue derived from sin taxes has risen year on year since 1994, with sin taxes showing great potential for future revenue generation.

An analysis of the 2017 Budget Speech performed by KPMG South Africa, commented on the possible tax options that are worth exploration as a means of raising revenue for the fiscus and reducing the revenue shortfall.⁶² Provided that sin taxes are adjusted at a rate higher than inflation, KPMG South Africa concedes that sin taxes levied on tobacco and alcohol show great potential for increased revenue generation.⁶³ Notwithstanding notable revenue generation associated with sin tax levies, great potential for negative externalities associated with the constant increase in sin taxes exist, such as the possibility of illicit trading of alcohol and tobacco exist.⁶⁴

In 2004 South Africa was considered as having the 6th biggest illicit⁶⁵ tobacco market in the world and was considered as one of the highest illicit tobacco markets in the world.⁶⁶ A Southern African Development Community (SADC) study regarding the illicit trade of alcohol found that South Africa is both a main destination and major source for illicit excisable alcohol products in the African region.⁶⁷

Although levying and increasing sin taxes is seen as an effective tool employed by the government to both reduce the excessive consumption of tobacco and alcohol and simultaneously generate revenue for the fiscus, little attention is given to the unintended effects that sin tax levies and increases may have. Price sensitive tobacco and alcohol

⁶¹ n 36 above.

⁶² n 36 above.

⁶³ n 36 above. As stated in the cited commentary, KPMG South Africa conceded that potential revenue generated from ranges between R5 –R7 billion for the foreseeable future, provided that increases in sin taxes are performed annually and adjustments are made higher than inflation. Currently tax revenue derived from sin taxes is estimated at 3.8 per cent of the total revenue collected by the SARS.

⁶⁴ See Page 7 of the National Treasury discussion document (n 30 above) discusses the potential of illicit trade and the effects that this has on the government strategies as well as health and social objectives set by the government. Also take note that the term ‘illicit trade’ refers to the illegal trading in tobacco and alcohol which is sparked by the inaccessibility of alcohol and tobacco. These illicit tobacco and alcohol products are cheaper and in all aspects are less quality which potentially affects the health of those who consume these products. Both China and the Russian Federation are considered to be the two countries with the biggest illicit tobacco market followed by the United States, the European Union and Brazil.

⁶⁵ n 64 above. See Lemboe et al “Cigarettes taxes and smuggling in South Africa: Causes and Consequences” (2012) 20.

⁶⁶ n 65 above.

⁶⁷ National Treasury ‘Taxation of Alcoholic Beverages in South Africa’ (2014). See <http://www.sars.gov.za/AllDocs/LegalDoclib/DiscPapers/LAPD-LPrep-DP-2014-02%20-%20Discussion%20Paper%20on%20Review%20of%20Taxation%20of%20Alcoholic%20Beverages%20in%20RSA.pdf> (accessed 4 June 2017).

consumers often turn to the consumption of illicit products (due to the affordability and accessibility thereof) as opposed to legal products. Thus, the election made by price sensitive consumers to consume alternative alcohol and tobacco products is evidence that sin taxes increases may have an inverse effect of discouraging the excessive consumption of tobacco and alcohol and may potentially contribute towards the furtherance of negative externalities associated thereto.⁶⁸

The propensity of the illicit trade of alcohol and tobacco (as discussed above) as well as the increasing burden that the excessive consumption of alcohol and tobacco has on the health care sector questions whether the South African tax system – by means of sin tax policy and increases in sin tax levies - is the best mechanism with which to address the negative externalities associated with the excessive consumption of alcohol and tobacco and the negative externalities associated thereto.⁶⁹

Having regard for the above factors, the National Treasury expressly states that:

“The tax regime for alcoholic beverages should provide certainty to both government and industry, and not be open to manipulation or undue lobbying. The complexity of the tax regime, the tax administration and compliance costs the impact on the economy and the potential impact of illicit trade should all be considered in reforming the excise taxes on alcoholic beverages.”⁷⁰

2.3.3 Reform of the specific excise tax levy

Between 1994 and 2001, the excise taxation system remained relatively the same with sin taxes increasing annually at a rate lower than or consistent with inflation but yielding revenue at the general international pace expected of sin taxes. At the Annual Conference of The International Bar Association in October 2002, in his address entitled “*The South African Tax Reform Experience Since 1994*”⁷¹ the then Minister of Finance, Trevor Manuel discussed certain aspects considering the reform of the South African taxation system. Aspects arising from the address alluded to a policy decision taken in 1996 that dictated that sin taxes on tobacco “should reflect a 50 per cent tax

⁶⁸ Lemboe et al “Cigarettes taxes and smuggling in South Africa: Causes and Consequences” (2012) 23.

⁶⁹ Manuel (MP) “The South African Reform Experience Since 1994” (2002) 9. An address given at the Annual Conference of The International Bar Association in October 2002.

⁷⁰ n 69 above..

⁷¹ n 13 above.

burden on the retail price of the commodity”.⁷² As a result, commencing in the year 2002 sin taxes levies on alcoholic beverages and tobacco products have consistently increased above inflation annually to reflect this intended policy decision.⁷³

A discussion document issued by the National Treasury regarding the taxation of alcoholic beverages in South Africa reinforced the foundation upon which the South African sin tax regime rests by highlighting the two reasons for levying sin taxes.⁷⁴ Although the South African sin tax model was reformed to reflect annual increases above inflation, these reasons still remained. Firstly, sin tax levies have a purely economic function and are envisaged to generate revenue which should preferably address socio-economic or negative externalities associated with the excessive consumption of alcohol and tobacco products. Negative externalities identified by the government include “increased health costs, loss of productivity/ absenteeism, domestic violence, road accidents (both motor and pedestrian)”.⁷⁵

Secondly, with reference to the price component of tobacco and alcohol, the National Treasury had envisaged that an increased price component of alcohol and tobacco (as a result of increased sin taxes) would discourage the excessive consumption of alcohol and tobacco – which is a noteworthy reason.⁷⁶

However, due regard must be given to the actual extent that the South African tax system can actually address socio-economic issues. The addictive nature of alcohol and tobacco may lead to a ‘perverse outcome’ whereby consumers are not guided by the price of tobacco and alcohol, and thereby consciously forgo ‘meritorious’ expenditure to maintain their now more expensive alcohol or tobacco consumption habit. Suffice to infer that excessive increases in sin taxes has an overall negative effect on consumers of alcohol and tobacco who are not price sensitive and who live in low income earning communities.⁷⁷ To reiterate, the inference may be drawn that ardent consumers of

⁷² Manuel (MP) “The South African Reform Experience Since 1994” (2002) 9. An address given at the Annual Conference of The International Bar Association in October 2002.

⁷³ Budget Review, 2017, National Treasury <http://www.treasury.gov.za/documents/national%20budget/2017/review/FullBR.pdf> (accessed 9 June 2017).

⁷⁴ National Treasury (2014), Taxation of Alcoholic Beverages in South Africa May 2014. See <http://www.sars.gov.za/AllDocs/LegalDoclib/DiscPapers/LAPD-LPrep-DP-2014-02%20-%20Discussion%20Paper%20on%20Review%20of%20Taxation%20of%20Alcoholic%20Beverages%20in%20RSA.pdf> (accessed 9 June 2017).

⁷⁵ n 19 above.

⁷⁶ n 69 above.

⁷⁷ n 69 above.

alcohol and tobacco who consume these commodities from their surplus funds are not as adversely affected as those consumers in low income earning communities – particularly with respect to the effects that the latter group eventually will have on state and state resources.

2.4 Conclusion

Emulating from history and current international practice, sin taxes were familiarised with the South African taxation system primarily, for revenue generation reasons and in order to discourage the excessive consumption of alcohol and tobacco - thereby decreasing negative externalities associated thereto.

As per the discussed analysis by KPMG South Africa, sin taxes have potential for revenue generation. Notwithstanding this, a careful balance is to be struck between the extent to which taxes are levied on alcohol and tobacco, as a number of negative effects may arise from these excessive increases.

The prevalence of the illicit trade of alcohol and tobacco largely looms as a result of the increasing price in alcohol and tobacco. Additionally, increases in sin taxes could potentially shift and arguably have shifted consumer expenditure from meritorious household expenditure – to alternative alcohol and tobacco products- in an attempt to satisfy and nurture the addiction of those who consume these substances. This has naturally resulted in the increase of negative socio-economic impacts both for the affected household and by extension their respective communities and the South African health care sector.

Sin taxes are “selective in coverage and discriminatory in nature”.⁷⁸ This is a statement made by the Minister of Finance in the 2014 Discussion document. Chapter 3 explores whether there is sufficient reason for the levying of sin taxes as these sin taxes have been construed as limiting the right to freedom of conscience as contained in section 15 of the Bill of Rights.

⁷⁸ n 30 above.

Chapter 3 - “Yes, you may smoke and drink, but...” a discussion of Section 36 its application and impact on the levying of Sin Tax

3.1 Overview

The Constitution acknowledges the fact that “South Africa belongs to all who live in it”.⁷⁹ The Constitution grants and guarantees certain rights to those who are citizens of South Africa in the aim of embodying and enhancing the abovementioned intention of the South African government. As such, this constitutional foundation inspires rights such as the right to freedom of conscience, which is an interpretation or inference of the right to freedom of religion, belief and opinion.⁸⁰ The right to freedom of conscience includes aspects of morality.⁸¹

The right to freedom of conscience recognises that morality differs amongst individuals. One person’s interpretation of morality may differ from another’s, in that one person may opt to exercise this right by engaging in a particular lifestyle- even though that lifestyle might be viewed as morally ‘reprehensible’⁸² – whereas another may not.

It is imperative that the correct balance is struck between exercising the rights listed in the Bill of Rights and the application of the limitation clause, as contained in Section 36 of the Constitution. The rights contained in the Bill of Rights are not autonomous and section 36 of the Constitution serves to limit the arbitrary exercise of these listed rights. This chapter explores the consequences of the excessive consumption of alcohol and tobacco, the content of section 36 and the interplay that section 36 has on a person’s choice to exercise their right as listed in section 15 of the Bill of Rights. Limiting rights contained in the Bill of Rights is a sensitive matter necessitating the application of section 36 so that such limitation can be seen to be justifiable in an “open and

⁷⁹ See Constitution of South Africa, 1996 (Preamble).

⁸⁰ n 7 above.

⁸¹ Morality is subjective topic. Which relates to principles regarding the distinction between behaviour which is generally acceptable and behaviour which is reprehensible. A discussion regarding the subjective nature of morality is not deliberated in this dissertation. The discussion relating to section 36 of the Constitution and its interplay with morality is based on the assumption that morality differs from one person to another and that the interpretation of ‘morality’ as acceptable by one person may not necessarily be acceptable to another. There is no right or wrong answer in this regard.

⁸² Reprehensibility is subjective in nature and is not explored in this dissertation. Thus electing to engage in a particular lifestyle/electing not to engage in a particular lifestyle does not render either of the groups of individuals as incorrect.

democratic society”.⁸³ Great emphasis is placed on the validity of the application of the limitation of rights as contained in section 36. Case law references discussed in Chapter 2⁸⁴ and associated commentary have served to highlight how the application of section 36 may be modified by performing regular due diligence in determining whether the application of the limitation is still constitutionally valid.

3.2 A general discussion of Section 36 – The Limitations Clause

Save for the correct application of the criteria listed in section 36(1) and section 36(2), the Constitution expressly states that “*no law*”⁸⁵ may limit any right entrenched in the Bill of Rights. When considering the constitutionality of the limitation of a listed right, the following criteria is considered:

- The nature of the right;
- The importance of the limitation;
- The nature and extent of the limitation;
- The relation between the limitation and its purpose; and
- Less restrictive means to achieve the purpose.

The above factors are essential to the correct application of the limitations clause – however, the application of section 36 is by no means limited to these factors. In addition to the above listed factors, South African courts are entitled to consider any other factors as deemed necessary when considering the limitation of the right in question.

3.3 The current practice of sin taxes in modern democratic South Africa

In an annual South African Demographic and Health Survey (SADHS) released by the South African Health Department, it was concluded that 28 per cent of South African men and 5 per cent of South African women exhibited risky behaviour, a consequence directly associated with the excessive consumption of alcohol.⁸⁶ The survey further

⁸³ See Section 36(1) of the Constitution, 1996.

⁸⁴ n 31 - 32 above.

⁸⁵ [Own Emphasis].

⁸⁶ See <http://www.statssa.gov.za/publications/Report%2003-00-09/Report%2003-00-092016.pdf> (accessed 20 June 2017).

revealed that 7 per cent of women aged 15 years and above and 37 per cent of men aged 15 and above were ardent consumers of tobacco.⁸⁷

Following, is a discussion of the impacts associated with the excessive consumption of alcohol and tobacco, from both a domestic and international perspective, which have given rise to the levying of sin tax on alcohol and tobacco, not only in South Africa but on an international scale as well.⁸⁸

3.3.1 The primary effects of tobacco consumption

For many years, the World Health Organisation (WHO) has advocated strong views regarding the detrimental health effects that result from use of tobacco.⁸⁹ These views relate primarily to the short and long-term health consequences associated with the excessive consumption and eventual addiction to tobacco. A significant number of these short and long-term health consequences that are linked to the excessive use of alcohol and tobacco have placed a burden on the health care systems of many countries. Research conducted by the John Hopkins Institute concluded that a number of heart and vascular diseases such as lung cancer and emphysema⁹⁰ are most commonly associated with the excessive consumption of tobacco. Domestically, statistics released by CAN/SA⁹¹ indicated that, “cancer kills more people every year than AIDS, tuberculosis and malaria combined”.⁹² The “most commonly diagnosed cancer” according to CAN/SA, is lung cancer.⁹³

⁸⁷ n 86 above.

⁸⁸ Although this dissertation, or the following discussion is not health based, a discussion of the impact of tobacco and alcohol is warranted in evidencing the causal link between the consumption of these substances and the detrimental health and socio economic effects thereof, which in turn gives or may give rise to the application of the limitations clause contained in section 36 of the Constitution.

⁸⁹ An analysis of the effects of tobacco conducted by the WHO in 2015 established tobacco use to be the most common “risk factor” which has resulted in the prevalence of the numerous cancers and accounts for approximately 22 per cent of cancer related deaths worldwide.

⁹⁰ Emphysema affects the air sacs, medically known as the alveoli, in the lungs. As a result, symptoms such as shortness of breath, coughing, fatigue, sleep and heart problems, weight loss and depression.

⁹¹ The Cancer Association of South Africa is a non-profit organisation that is enabled to research and educates the public on cancer and cancer-related matters.

⁹² According to statistics released by Stats SA in its media release dated 28 February 2017, non-communicable diseases continue to rise in the rankings of the top 10 leading causes of mortality and the causes of death and formed 60% of the leading underlying natural causes of death. Amongst these non-communicable diseases is “chronic respiratory diseases”- See <http://www.statssa.gov.za/?p=9604> (accessed 2 June 2017).

⁹³ n 92 above.

It is noted that the most common causes of cancer-related deaths range in severity from lung, liver and malignant cancers.⁹⁴

3.3.2 Secondary effects of tobacco consumption

In addition to the direct effects of excessive tobacco consumption, secondary effects of the excessive consumption of tobacco have raised concerns. Persons who are excessively exposed to the tobacco consumed by others are at an increased risk of contracting a range of tobacco-related diseases, including lung cancer, heart disease and strokes.⁹⁵

3.3.2.1 Passive smoking in children and adults

Children, who are exposed to 'second-hand' smoke, have great probability of developing a range of respiratory diseases such as asthma, bronchitis and pneumonia. Prolonged exposure to 'second-hand' smoke has resulted in the development of chronic respiratory conditions.⁹⁶

Adults who are exposed to 'second-hand' smoke for at least 30 minutes a day have shown great probability of contracting coronary heart diseases that may manifest into heart attacks and strokes.⁹⁷ These effects are evidence that excessive exposure to 'second-hand' smoke from tobacco has the propensity of resulting in effects that are to *a similar degree as those seen in people who consume tobacco*.⁹⁸

3.3.2.2 Mechanisms to combat passive smoking

Given the direct and indirect results associated with the excessive consumption of tobacco consumption, the Society for Research on Nicotine and Tobacco (SRNT), founded in 1994, has worked extensively with the WHO and many governments

⁹⁴ According to research conducted by the Globocan research institution regarding cancer diagnosis, yielded the following results, approximately 1.8 million (13%), 1, 7 million (11.9%) and 1.4 million (9.7%) were attributed to lung, breast and colorectum lung disease respectively. See also n 80. Further to this 1.6 million (19.4%), cancer- related deaths were attributed to lung cancer related deaths and 0.8 million (9.1%) and 0.7 million (8.8%) were attributed to liver and stomach cancer respectively (<http://www.globocan.za/> accessed 2 June 2017).

⁹⁵ See <https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/passive-smoking> (accessed 15 June 2017).

⁹⁶ n 95 above.

⁹⁷ n 95 above.

⁹⁸ n 92 above.

worldwide and has been greatly instrumental in setting policies regarding issues that relate to the advertising and taxation of tobacco.

The SNRT has played a significant role in the modification of domestic laws of many countries regarding the control of public tobacco consumption, as a means of deterring the primary and secondary effects associated with the excessive consumption of tobacco. An apt example is Pueblo Colorado where hospital admissions, which were previously directly related to tobacco induced heart attacks, significantly dropped by 27 per cent by the year 2005, as a result of work performed by organisations such as the SNRT.⁹⁹ This was within the first 18 months since tobacco restrictions were passed by the government in 2003.¹⁰⁰ The following discussion relates to the effects of excessive alcohol consumption.

3.4 The effects of alcohol consumption

An estimated 6.4 per cent of all deaths in the Sub-Saharan African region are attributed to the excessive use of alcohol and the seeming dependency thereon.¹⁰¹ Excessive alcohol consumption has resulted in the prevalence and increase of communicable diseases such as HIV/AIDS in many parts of the African region.¹⁰²

3.4.1 Alcohol consumption in South Africa

A statistical update conducted by the WHO concluded that South Africa is ranked amongst the top 20 “biggest drinking nations in the world”.¹⁰³ As at 2015 the WHO concluded that South Africa had topped the “list of drunk-driving related deaths in the world”. The South African drinking population is said to be consuming on average 27 of litres of pure alcohol per capita year –one of the highest rates of alcohol consumption in the world- with South African alcohol consumption expected to increase significantly

⁹⁹ This research was conducted by the US National Library of Medicine National Institutes of Health in an article entitled “Reduced hospitalizations for acute myocardial infarction after implementation of a smoke-free ordinance--City of Pueblo”. See <https://www.ncbi.nlm.nih.gov/pubmed/19116606> (accessed 8 June 2017).

¹⁰⁰ n 99 above.

¹⁰¹ Ferreira – Borges, C et al Harmful Use of Alcohol: A Shadow over Sub-Saharan Africa in Need of Workable Solutions (2017) as researched in the International Journal of Environmental Research and Public Health. (accessed 21 June 2017)

¹⁰² n 20 above.

¹⁰³ See article entitled “South Africa alcohol consumption vs the world” published in an online article in the BusinessTech. See <https://businesstech.co.za/news/lifestyle/124939/south-africa-alcohol-consumption-vs-the-world/> (accessed 4 September 2017).

by 2025.¹⁰⁴ From an African Region perspective, South Africa is ranked the “third biggest drinking nation”.¹⁰⁵

In July 2018, a study regarding South African alcohol drinking patterns had shown that one in 10 deaths in South Africa could be attributed to alcohol abuse in some way. More noteworthy is the fact that men in low-income groups have shown greater propensity to such a risk.¹⁰⁶ According to the cited study, South Africa has a significant drinking population with almost half of all adults being current or binge drinkers (though the majority still abstains).

Although various adults (across all socio-economic levels) within the South African population engage in alcohol consumption the cited study has shown that it is generally the middle and lower-income earning groups that drink the most, and whom are most prone to alcohol abuse.

The table below, as contained in the article entitled “South Africans are drinking themselves to death” outlines South Africa’s drinking habits by group as well as the resultant mortality rates:

Socio-economic level	Men			Women			Total
	High	Middle	Low	High	Middle	Low	
Total deaths	48,469	95,873	122,436	44,289	92,189	126,146	529,402
Injuries	1,850	4,334	4,600	320	604	627	12,335
Infections diseases	2,051	4,768	18,311	601	1,171	6,520	33,422
Chronic diseases	2,985	4,205	5,981	1,181	1,946	3,240	19,538
Total attr. to alcohol	6,886	13,307	28,892	2,102	3,721	10,387	65,295
%	14.2%	13.9%	23.6%	4.7%	4.0%	8.2%	12.3%

Evidently, it is within the low-income earning South African population that the greater portion of alcohol-related deaths are reported. The table above shows the total death rate as well as the number of injuries, infectious and chronic disease deaths that can be directly attributable to alcohol.

¹⁰⁴ n 103 above.

¹⁰⁵ n 103 above.

¹⁰⁶ See article entitled “*South Africans are drinking themselves to death*” published in an online article in the BusinessTech. See <https://businesstech.co.za/news/lifestyle/257237/south-africans-are-drinking-themselves-to-death/> (accessed on 28 June 2019).

3.4.2 Socio-economic effects of alcohol in South Africa¹⁰⁷

The Department of Social Work in collaboration with the department of psychosocial behavioural sciences and the Centre of Excellence for nutrition at the North West University Mafikeng and Potchefstroom campuses, conducted a study regarding the socio-economic effects of excessive alcohol consumption in South Africa.¹⁰⁸ Notably socio-economic effects associated with alcohol abuse included unemployment, violence, crime, risky sexual behaviour and disruptions to family life and work. The below discussion details these results.

Violence and crime. Excessive alcohol consumption alters a person's way of thinking and potentially increases aggressive behaviour towards family members, friends or members of the community of those who excessively consume alcohol. An analysis conducted in 3 major metropolitan areas (Cape Town, Durban and Gauteng) regarding the risks associated with the excessive use of alcohol, indicated that alcohol was a large contributory factor in the spate of housebreakings, thefts and rapes in these metropolitan areas.¹⁰⁹

Work performance and family disruption. Absenteeism from work, job-related accidents and low productivity in the workplace, are rated amongst the common results of the excessive consumption of alcohol.¹¹⁰ The excessive consumption of alcohol and the dependency thereon increases the chances of retarding efforts of balancing family life.¹¹¹ Household funds intended to for family expenses are often diverted to the purchasing of alcohol which (in the case of addicted low income earners) increases poverty and family violence noted *supra*. Children raised by an alcoholic parent(s) often adopt the negative behavioural patterns displayed by their parent(s) which often affects their school and adult lives. Additionally, alcohol abuse is often closely associated with the violence perpetrated against women in the household.¹¹²

¹⁰⁷ Owing to time constraints, extensive case studies on the effects of alcohol and tobacco have not been explored in this dissertation.

¹⁰⁸ Setlalentoa *The socio-economic effects of binge drinking on support networks in the North West Province: A social perspective* (2009 thesis SA). See also Setlalentoa "The Social aspects of alcohol misuse/abuse in South Africa" 2010 *South African Journal on Clinical Nutrition* (S Afr J Clin Nutr).

¹⁰⁹ Setlalentoa "The Social aspects of alcohol misuse/abuse in South Africa" 2010 *South African Journal on Clinical Nutrition* (S Afr J Clin Nutr) 13.

¹¹⁰ Setlalentoa "The Social aspects of alcohol misuse/abuse in South Africa" 2010 *South African Journal on Clinical Nutrition* (S Afr J Clin Nutr) 14.

¹¹¹ n 110 above.

¹¹² Bezuidenhout FJ Substance abuse and addiction: Drugs and alcohol (2004) 127–128.

In deciding on whether to use available financial resources to purchase alcohol or tobacco, low income earners, who are addicted to consuming these substances, often direct their available financial resources from ‘meritorious’ purchases to those which nurture their consumption habits and addictions. As a result, low-income earning communities experience greater financial pressure which often leads to the increased socio-economic and negative externalities discussed above. Negative externalities, such as those briefly alluded to above, result in dire consequences both to the South African health care sector as well as to the general order of the South African state. Increased State resources are often deployed to combat violence and crimes (i.e. those directly associated with the excessive consumption of alcohol) as well as the need for increased State assistance, by means of social grants, to those that have lost their employment as a result of the excessive consumption of alcohol.

Sin taxes levies and increases therein can be construed as a limitation of the rights to freedom of conscience as contained in the Constitution¹¹³ (as remarked above). In light of the above discussion, this construed limitation is discussed in further detail below.

3.5 South African courts’ approach to the limitation of rights

The limitation of rights clause as contained in section 36, is applied proportionally to the affected right. Transposed into South African law, the concept of proportionality was legally analysed in the case of *S v Zuma*.^{114 115} Proportionally limiting a right should include elements of ‘reasonableness’, ‘rationality’ and ‘public interest’, which entails a balanced enquiry between the limitation of the right in question and the reason therefore.¹¹⁶ The concept of ‘proportionality’ attracted great constitutional attention and was later modified in the case of *S v Makwanyane*.¹¹⁷

Although the underlying elements of proportionality are relevant, the concept of proportionality was modified when the Constitutional assembly decided that the test for limiting constitutionally guaranteed rights was to be the application of section 36 of the Constitution and the factors listed therein. As such, limiting constitutionally guaranteed rights must be done in a manner consistent with values acceptable in an “*open and*

¹¹³ n 7 above.

¹¹⁴ (CCT5/84) 1995 ZACC 1 (5 April 1995).

¹¹⁵ IM Rautenbach *Proportionality and the limitation clauses of the South African Bill of Rights* 2014.

¹¹⁶ n 115 above.

¹¹⁷ 1995 3 SA 391 (CC).

democratic society based on human dignity, equality and freedom”¹¹⁸ and not merely in a manner evidencing ‘public interest’ or ‘reasonableness’ (as discussed above).

The *ratio decidendi* formulated in the *S v Makwanyane*¹¹⁹ shows that the courts rigorously follow the factors listed in section 36 (discussed above) in determining whether the limitation of a right listed in the Bill of Rights is constitutionally justified. When limiting the rights of one group in favour of another (i.e. those who consume tobacco and alcohol vs. those who do not consume alcohol and tobacco) the interests of both groups must be protected, as far as constitutionally possible. The courts’ ability to limit the application of listed rights largely relates to the concept of differentiation. A discussion regarding the concept of differentiation - as applied between various groups- is briefly discussed in detail below.

3.5.1 A general discussion of the concept of differentiation

The concept of differentiation and the circumstances justifying the differentiation between groups was discussed in the case of *Harksen v Lane*.¹²⁰ In the aforementioned case, the South African courts acknowledged that:

The *prima facie* differentiation between groups does not amount to discrimination. Differentiation is an approach commonly used by the South African courts in order to justify limiting the rights of one group in favour of the protection or furtherance of the rights of another group.

The following factual questions have been developed when considering the constitutionality of differentiation between groups of individuals:

1. Is there evidence of differentiation; and is there is a legitimate government purpose for such differentiation?
2. If so, has the differentiation or discrimination violated a listed right?
3. If so, is the differentiation or discrimination unfair?

An affirmative answer of these question establishes a justification for differentiation. Thus entailing that when scrutinising the above questions in the aim of considering the application of section 36 to the listed rights of various groups (i.e. differentiation), this

¹¹⁸ See section 36(1) of the Constitution 1996.

¹¹⁹ n 117 above.

¹²⁰ (CCT9/97) 1997 ZACC 12 (7 October 1997).

may suggest that the limitation of a listed right would be construed as justifiable in an open, democratic society.

3.6 Section 36 and Sin tax

In light of the evidenced direct and indirect effects associated with the consumption of alcohol and tobacco consumption, as explored in this chapter, the practice of levying sin taxes can be construed as a justified manner in which to limit the application of the listed right as set out in section 15 of the Constitution.

This justification can be aptly illustrated as follows:

1. Is there evidence of differentiation; and is there is a legitimate government purpose for such differentiation?

Application to section 15 of the Constitution

Considering the direct and indirect results that the excessive consumption of alcohol and tobacco, and the detrimental effect that this has placed on South African communities, the South African health care system and the consumers thereof¹²¹, sin taxes are justifiable. Levying sin taxes as means of decreasing accessibility and by extension, addressing negative externalities associated with the excessive consumption of alcohol and tobacco, while generating revenue in order to fund state development initiatives, is a legitimate government purpose.

2. If so, has the differentiation or discrimination violated a listed right?

Application to section 15 of the Constitution

As discussed *supra*, persons who engage in the consumption of alcohol and tobacco utilise the right listed in section 15 of the Constitution, which entails the right to freedom of conscience - and by extension the right to freedom of choice. The practice of levying sin taxes could be contrived to be *prima facie* discriminatory in nature, particularly by those who choose to engage in the consumption of alcohol and tobacco - as they may well be compelled to either elect to stop their consumption of alcohol and tobacco. Furthermore, if those

¹²¹ n 20 above.

who excessively consume alcohol and tobacco do not desist in their excessive consumption habits – as a means of exercising their section 15 rights may, divert their income from meritorious household expenditure and this could result in largely disadvantageous negative externalities – particularly in the case of low income earning households – as discussed above.

3. If so, is the differentiation or discrimination unfair?

Application to section 15 of the Constitution

An investigation of the negative externalities resulting from the excessive consumption of alcohol and tobacco, differentiating between those who consume alcohol and tobacco and those who do not consume these substances by levying sin taxes (i.e. limiting the exercise of the listed right contained in section 15) cannot be seen to be unfair. Differentiation between the two groups is evident, however, levying sin taxes and increasing inaccessibility to alcohol and tobacco cannot be seen as unfair given the extent of the detriment that is caused by the excessive consumption of these substances as discussed *supra*.

Although a legitimate government purpose aimed at generating revenue and potentially decreasing negative externalities associated with the excessive consumption of alcohol and tobacco, is established, consideration should be given to the effectiveness of sin taxes. Taxation is a sensitive matter – one which directly affects a persons' financial affairs – therefore there is no generic approach that can be relied on when enforcing taxation in whichever form.¹²²

Given the past political climate, which largely disadvantaged the majority of South Africans (particularly those living in low income earning communities) and fostered unequal distribution of wealth, the present South African taxation system favours a tax structure which is progressive.¹²³ Furthermore, a taxation system that is conducive to wealth generation and wealth distribution and redistribution goals was envisaged by the ushering in of the new South African government in 1994.

¹²² Stiglingh M et al *Silke: South African Income Tax* (2016) 1189.

¹²³ n 46 above.

However, the evolving wants and needs of citizens within the Republic dictates that policy makers cannot always decisively ascertain reactions to policy. For example, a tax policy (i.e. sin tax levies) may be the best for one group of people (i.e. those who do not consume alcohol and tobacco and who are adversely affected by the actions of those who do), but may conversely be to the detriment of another group of people (i.e. those who wilfully consume alcohol and tobacco and derive enjoyment therefrom). The above exploration of the right to freedom of choice as contained in section 15 of the Constitution together with the discussion of the concept of differentiation indicate that sin taxes are in fact constitutional.

Given this evidenced sensitive nature of taxation, it is imperative that tax policy decisions and revisions undertaken by policy makers be guided by an evaluation of the following factors, namely; the correct tax base, tax rate structure and the consideration of tax liability shifting instances. A brief explanation of these three pillars follows which highlights the factors that are to be considered when designing tax laws or tax policies.

3.6.1 A general discussion of the cardinal pillars of taxation and the principles of a good tax system

1. The correct tax base.

A tax base denotes the economic income amount upon which taxes are levied.¹²⁴

It is important to implement tax policies that increase the tax base, because an increasing or increased tax base would simultaneously increase the amount of tax revenue collected or that could potentially be collected. Having a broad tax base, in itself may not be a sufficient revenue generator, if the base in itself does not provide sufficient opportunity for expansion,¹²⁵ or if the correct tax structure is not implemented.

2. Tax rate structure

A tax rate is often expressed as a percentage (i.e. 15 per cent Value Added Tax which is imposed on taxable supplies) or an amount per unit, which is often the case with sin tax (i.e. R17,44/50g in the case of tobacco in 2019 and a proposed

¹²⁴ See Section 1 of the Income Tax Act 58 of 1962, amended.

¹²⁵ Stiglingh M et al *Silke: South African Income Tax* (2016) 1193.

increase to R18,73/50g in 2020).¹²⁶ Tax rates include a marginal,¹²⁷ statutory,¹²⁸ average,¹²⁹ and effective economic tax rate.¹³⁰ Tax rates are applied with respects of three tax structures namely; a progressive,¹³¹ proportional,¹³² and regressive¹³³ tax structure.

3. Determining the tax liability.

A determination of the correct tax rate structure would be a futile exercise if a determination regarding whom the tax liability is incumbent upon is not correctly decided. It is imperative for policy makers to deliberate on the possibilities of tax burden shifts. Shifting of tax liability can effectively reduce the tax base and pervert tax revenue collections.

An example of shifting the tax burden can be illustrated when considering the accounting of excise taxes paid by large multinational producers. Suffice to infer that large alcohol and tobacco producers (i.e. Anheuser-Busch InBev or British American Tobacco) are subject to enormous amounts of excise tax on products that are produced or brought to the Republic. For example, in recent years, the total tax revenue collected by the SARS from SABMiller, by means of customs and excise duties, amounted to USD 1 302 million.¹³⁴ In a more

¹²⁶ See National Treasury Budget Review 2019 <http://www.treasury.gov.za/documents/national%20budget/2019/review/FullBR.pdf> (accessed 28 June 2019).

¹²⁷ The tax rate that will apply should the tax base increases by R1. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1195.

¹²⁸ A tax rate imposed on the tax base as determined in accordance with legislative provisions. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1195.

¹²⁹ The rate at which tax is paid with reference to the total tax base of a relevant taxpayer which is determined by dividing the total tax liability by the total tax base. The total tax base is determined having regard for relevant legislative provisions. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1195.

¹³⁰ This rate is determined by dividing the tax liability by a specified income amount and is used as a measure of facilitating comparisons between tax systems of various countries and tax liabilities of different taxpayers. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1195.

¹³¹ The effective tax rate increases as the tax base or economic income increases. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1197.

¹³² The effective tax rate does not change in line with the tax base or economic income. See n 46 above.

¹³³ The effective tax rate increases as the tax base or economic income decreases. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1197.

¹³⁴ See <http://www.ab-inbev.com/content/dam/universaltemplate/ab-inbev/investors/sabmiller/reports/our-approach-to-tax-reports/tax-report-2016.pdf> (accessed 15 September 2017).

recent tax year, British American Tobacco paid in the excess of R14.5 billion in customs and excise taxes over to the SARS.¹³⁵

Given the exorbitant tax costs arising from tax levies attributable to customs and excise duties, which are payable to SARS, it is not inconceivable to infer that large alcohol and tobacco producers would want to increase or maintain their profit margins by accounting for these exorbitant tax costs in their final retail price. Increases in the retail amount of alcohol and tobacco, in order to account for these tax costs, can be seen as a manner of 'shifting' the tax burden. Such 'shifts' in tax liability result in the possible dual levying of excise/sin taxes (i.e. tax burden shifting and legislated sin tax increases by the Treasury) on end consumers of alcohol and tobacco, which may ultimately retard South Africa's wealth redistribution goals.¹³⁶

A consideration by policy makers of the above factors would entail modification or revision of policies (such like those undertaken by the courts as discussed above). These cardinal pillars of taxation are discussed in more detail below and are applied to the case study of the Eastern Cape.

In addition to the above pillars of taxation, it is imperative for policy makers to implement tax policies which are in accordance with the accepted principles of a good system. These are namely; the principle of equity,¹³⁷ certainty,¹³⁸ convenience,¹³⁹ economic efficiency,¹⁴⁰ administrative efficiency,¹⁴¹ flexibility,¹⁴² and simplicity.¹⁴³

¹³⁵See http://www.batsa.co.za/group/sites/BAT_A2ELAD.nsf/vwPagesWebLive/DO9YABCP (accessed 15 September 2017).

¹³⁶ Stiglingh M et al *Silke: South African Income Tax* (2016) 1198.

¹³⁷ Tax should be imposed according to one's taxable ability or capacity. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1199.

¹³⁸ The timing, amount and manner of tax payments must be certain. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1199.

¹³⁹ Tax should be imposed in a manner or at a time that is convenient to taxpayers. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1199.

¹⁴⁰ Tax should be designed in a manner or at a time not unduly influencing economic decision making. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1199.

¹⁴¹ The tax system should be designed in such a manner as not to impose an unreasonable administrative burden on the taxpayer and the Revenue Authorities. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1199.

¹⁴² A good tax system should be designed in such a manner that it can easily adjust in response to changing economic circumstances. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1203

¹⁴³ A tax should be designed in such a manner that it is easy to understand and apply. See Stiglingh M et al *Silke: South African Income Tax* (2016) 1199.

Having regard to the divergent needs and economic status of citizens within the Republic, it is imperative that the above pillars of taxation are considered in addition to the principles or tenets of a good taxation system, so as to ensure that the correct balance is struck between revenue generation goals and the interests of society - particularly socio-economic groups who bear the tax liability. This will ensure that governments do not arbitrarily impose tax policies that would achieve the 'optimal tax level' which solely benefits the fiscus, but rather that tax policy makers develop tax policies that advance progressive intentions and do not unduly pressurize those who are affected by the imposition of tax levies.

3.7 Conclusion

This chapter has concluded that sin taxes are in fact constitutional. The selective nature of sin taxes can therefore be justified given constitutionally verified tests such as the differentiation between consumers of tobacco and alcohol and those who do not consume alcohol and tobacco. Furthermore, given the extensive detrimental effects resulting from the excessive consumption of alcohol and tobacco – as have been presented in this dissertation - it is reasonable to conclude that sin taxes, although selective and *prima facie* discriminative in nature are in fact justifiable.

Essentially, sin tax policies retain validation, whether these may be considered as regressive or not.

Sin tax is undoubtedly a viable revenue generation avenue for the fiscus. However, policies that develop and maintain sin taxes, must be tested against the three pillars of taxation and the principles of a sound taxation system as discussed *supra*. Particularly considering the potential unintended effects that increased sin tax levies may have (i.e. tax burden 'shifts') and the regressive nature of sin taxes. Sin taxes could also be viewed as regressive in nature. This is as a result of the fact that the tax base upon which sin taxes is levied (particularly upon the income of citizens living in low income earning communities) does not generally increase at the same pace as sin tax levies, when considering the tax base of those who consume alcohol and tobacco in low income earning communities.

The South African government favours progressive tax rates, thus dictating that the very nature of sin tax is not in line with government strategy, a fact to which National

Treasury concedes.¹⁴⁴ A progressive tax rate is favourable as it enables the South African government to levy taxes in a manner that would promote the increase of the tax base upon which these are levied – thus allowing the South African government to collect increased revenue. The excessive increase in sin taxes may adversely affect the fiscus (i.e. promotion of illicit trade which may eventually hamper the total contribution of large producers to the fiscus and retard GDP growth). This may also result in a consumption shift, largely as a result of consumers who are price sensitive (i.e. the potential decrease or shifting of household income from meritorious expenditure in order to nurture addictive consumption habits; or the consumption of illicit products that can result in an increase of non-communicable diseases that would place a burden on the South African healthcare system when these consumers become incapacitated). These adverse effects question the suitability of the current South African sin tax model, as a means of addressing socio-economic ills and the negative externalities associated with the excessive consumption of alcohol and tobacco, albeit that the current sin tax model derives notable revenue.

Consequently, and as can be seen from the evidence presented above, the conclusion reached in this chapter is that sin taxes are in fact viable. However, stringent measures should be taken as respects the manner in which the revenue generated from sin taxes is utilised.

Chapter 4 discusses the effects that constant sin tax increases have actually had within South African context and discusses the appropriateness of a ‘blanket’ sin tax model in instances where consumers are not price sensitive. The Eastern Cape is used as an example of the regressive nature of sin taxes which highlights the regressive nature of sin taxes – due to the economic climate prevalent in that region as a majority of those affected by sin taxes are predominantly those from low income earning communities. Chapter 4 also includes an analysis of the Philippine sin tax model. A discussion of the Philippine and South African sin tax model is explored in order to determine whether the current sin tax model aptly achieves a balance between revenue generation goals and government intentions to discourage the excessive consumption of alcohol and tobacco. The analysis of the Philippine sin tax model relates to the optimal manner in which sin

¹⁴⁴ National Treasury Budget Review (2016) 38.

taxes should be levied and shows the benefits of not levying sin taxes in an ‘all inclusive manner/blanket’ manner and the benefits associated thereto.



Chapter 4 - *Is a general sin tax the best method of addressing the negative externalities resulting from the excessive consumption of alcohol and tobacco?*- a analysis of the Philippine sin tax model; the benefits and the lessons to be transposed to the South African Sin tax model

4.1 Overview

Chapter 2 of this dissertation discussed reasons which justify the levying of sin taxes. Chapter 3 discussed the constitutional framework within which sin taxes operate and determined that limiting the application of section 15 rights is justifiable. Although the validity of sin taxes has been determined, chapter 3 discussed the principles and considerations that policy makers should take into account when developing or implementing tax practices or policies and those that are to be considered when opining on the possibility of reviewing the current sin tax structure. Thus, ensuring that the correct balance between public interest, government policy and constitutional rights is achieved.

Chapter 3 further highlighted the possible fallacies that the current South Africa sin tax model presents, which include an inference of tax burden shifting and illicit trading in alcohol and tobacco. Chapter 3 also alluded to heavy consumers of alcohol and tobacco consumers who are not price sensitive and discussed instances whereby excessive price increases in alcohol and tobacco (i.e. that potentially arise as a result of increases in sin taxes), may not necessarily effectively discourage the purchase and consumption of alcohol and tobacco. However, excessive increases in sin tax levies could result in stripping the economic base of ardent consumers of alcohol and tobacco and further fuelling negative externalities in low income earning communities.

4.2 Assessing the suitability of the South African tax system to address socio economic problems

Although sin taxes display great revenue generation potential,¹⁴⁵ a noteworthy objective of any good taxation system - when developing tax policies it is imperative for policy makers to be cognisant of the economic inequality which still exists in South Africa and

¹⁴⁵ n 36 above.

to bear in mind that economic inefficiencies still remain relatively high in low income earning communities.

4.3 Case study - Eastern Cape¹⁴⁶

Research conducted regarding the socio-economic impacts of alcohol and substance abuse in the Eastern Cape, found that 64 per cent of men and women consume tobacco and alcohol as a form of 'escape', as opposed to 36 per cent of the Eastern Cape population which consume tobacco and alcohol for recreation purposes.¹⁴⁷ Research conducted by the SADC regarding members of the community who have been found to consume alcohol and tobacco as a means of 'escaping' their economic, social woes are predominantly from the following 'vulnerable subgroups':¹⁴⁸

1. Male consumers;
2. Having a lower household income;
3. Being single, widowed or divorced;
4. Being younger; and
5. Having fewer social connections.

¹⁴⁶ Numerous other geographical areas are adversely affected by the excessive consumption of alcohol and tobacco and the associated negative externalities (i.e. Eldorado Park). However, the Eastern Cape is earmarked numerous times by various economic studies as one of the hardest hit provinces in South Africa of sin tax. Owing to time constraint, only the Eastern Cape is used as a case study evidencing the regressive nature of tax. Granted the implementation of sin tax policy and the annual increases sin taxes also affect ardent consumers of alcohol and tobacco in more affluent income earning areas such as the Gauteng and Western Cape region. Suffice to say that ardent consumers of alcohol and tobacco in these regions, are also affected by the annual increases in sin taxes. Although this may be so, the overall effect of the consumption of alcohol and tobacco by the latter group does not impact the South African healthcare to the extent of that of the prior group. This inference is made on the basis that the latter group has access to private facilities such as medical aid and can thus afford to remedy the consequences of their excessive consumption of alcohol and tobacco without placing a burden on the South African health care system. The premise upon which this dissertation is found is to investigate the effect that tax policy – such as sin tax- has had on government objectives such as discouraging negative consumption patterns. More specifically, this dissertation also investigates the actual effects that annual increases in sin taxes has on more vulnerable groups, because research (presented in this paper and otherwise) has shown how the excessive consumption of alcohol and tobacco adversely affects these vulnerable groups to a greater extent. Even though a progressive sin tax is advocated, given government goals of discouraging negative consumption patterns and raising revenue for the fiscus, the premise upon which this dissertation is found discusses the actual effects on sin tax increases in low income earning regions. As such a discussion of the effects of sin taxes in more affluent income earning areas such as the Gauteng and Western Cape region are not explored in much detail.

¹⁴⁷ SADC research conducted on the Social and Economic Impacts of Alcohol Abuse in the Eastern Cape (2010). <http://www.eclb.co.za/cms/wp-content/uploads/Social-and-Economic-Impacts-of-Alcohol-Absue-in-EC-2010.pdf> (accessed 16 June 2017).

¹⁴⁸ n 141 above.

The regressive nature of sin taxes is particularly important when opining on the characterisation of the second vulnerable sub-group listed above namely; those who 'have a lower household income'. The national average of household income expended on alcohol is 0.7 per cent.¹⁴⁹ A comparative analysis of household income expended on alcohol in the Eastern Cape found that household alcohol expenditure in urban Eastern Cape was averaged at 0.7 per cent (which was in line with the national average of household expenditure on alcohol). Whilst the average household income expended on alcohol in rural Eastern Cape was earmarked at 0.9 per cent.¹⁵⁰

Considering this difference in consumption patterns and assuming that persons in rural Eastern Cape include persons who fall within the 'low household income' vulnerable subgroup, excessive increases in sin taxes may have adverse effects on heavy consumers of alcohol and tobacco who are not price sensitive in these rural areas. Suffice to infer that heavy consumers of alcohol and tobacco in this vulnerable subgroup often forgo the purchase of household necessities when faced with the economic decision to do so, which largely results from the excessive increases in sin taxes. This in turn results in the adverse negative externalities discussed in chapter 3 *supra*.¹⁵¹

The following discussion relates to the effects of sin taxes in low income earning communities, and considers the suitability of the current South African sin tax model in addressing the negative externalities associated with the excessive consumption of alcohol and tobacco, in light of the three pillars of taxation discussed in the preceding chapter.

4.3.1 The concept of 'Tax Structure'

Considering the stagnant economic growth in rural Eastern Cape whereby the economic income of the population in rural Eastern Cape is not said to be steadily increasing, sin taxes can be construed as regressive.¹⁵² This entails that annual increases in sin taxes

¹⁴⁹ Social and economic impacts of alcohol abuse in Eastern Cape (2010) <http://www.eclb.co.za/cms/wp-content/uploads/Social-and-Economic-Impacts-of-Alcohol-Absue-in-EC-2010.pdf> (accessed 16 June 2017).

¹⁵⁰ n 149 above.

¹⁵¹ Noticeable impacts of a decrease in household income expenditure on meritorious purchases are amongst others reasons which contribute to growing social ills such as domestic violence, assaults fuelled by aggressive behaviour and road accident crimes. See Social and economic impacts of alcohol abuse in Eastern Cape (2010) 22. See <http://www.eclb.co.za/cms/wp-content/uploads/Social-and-Economic-Impacts-of-Alcohol-Absue-in-EC-2010.pdf> (accessed 16 June 2017).

¹⁵² n 127 above.

which are above inflation, in areas such as the Eastern Cape cannot be said to be promoting or facilitating economic growth, given that the economic income upon which sin taxes are levied in the Eastern Cape cannot be said to be increasing at the pace at which sin tax levies are increasing. This contrasts the objectives of the South African taxation system which aims to promote progression and redistribution of resources.¹⁵³ Furthermore, this regressive nature of sin tax creates ample opportunity for illicit trade; and the eventuality of vulnerable sub-group consumers who live in rural Eastern Cape turning towards the consumption of alternative substances (i.e. *nyaope*, *wonga*, illegal cigarettes and home-brewed alcohol). This election may conversely result in severe negative externalities for communities where the consumption of these illegal products is prevalent and further burden State resources (as allude to preceding chapters). Following is a discussion of the current sin tax model as it operates, when considering the three pillars of taxation as discussed in the preceding chapter.

4.3.2 The concept of 'Tax base'

Sin taxes levied on stagnant or decreasing household income (due to slow economic growth) particularly associated with low income or rural communities such as rural Eastern Cape, cannot be seen as an adequate revenue generator. Granted sin taxes levied in this regard can generate revenue for the fiscus, however, it can be inferred that the current sin tax policy retards efforts to increase the tax base in areas such as rural Eastern Cape.

Secondly, as seen from the conclusions drawn in the discussion document issued by the National Treasury in relation to the taxation of alcoholic beverages in South Africa (referred to in chapter one *supra*), excessive sin tax increases encourage greater opportunity for illicit trade. With price sensitive consumers electing to consume alternative substance and substituting their consumption of reputable products (such as legal products produced by the reputable producers, as noted above) with illegal or illicit products which are more affordable, the long term effects may be that this consumption shift may detract from the profit margins of large producers. Should the trend of illicit trade continue, this could ultimately affect the tax collected from large

¹⁵³ National Treasury Budget Review (2016) 38.

alcohol and tobacco producers and eventually strip at the customs and excise tax base and potentially pervert GDP contribution and South Africa's overall economic growth.

4.3.3 The concept of 'Tax liability'

As stated above, assuming that a producer factors in excise duties by increasing the price of the product to a consumer who is not price sensitive, such a consumer would essentially be subject to dual taxation costs such as those that are suffered by the producer as a result of excise tax; and sin taxes levies imposed by the government.

An equitable taxation system envisages the right amount of tax being collected from the correct taxpayer. An equitable taxation system further discourages tax burden liability shifts. Excessively increasing sin taxes has the potential of tax burden liability shifts from large taxpayers to the end user consumer, which may render the South African sin tax policy as contradictory to the principles of a good tax system (as discussed in the preceding chapter).

Additionally, tax policies (such as the sin tax policy) should evidence the principle of economic efficiency, which dictates that tax policies and/or tax rates should not be implemented or levied so as to unduly influence economic expenditure.¹⁵⁴ Given the high probability of non-price sensitive heavy consumers of tobacco or alcohol detracting from needed household expenditure, or turning toward the consumption of alternative substances, this does not evidence sin tax policies or sin tax levies as being pursuant of the tax principle of an economic efficient tax policy.

As mentioned in the preceding chapter, an 'optimal level of tax' should be struck between what is rightly collected from producers, what is levied and collected from consumers and the tax rate that is legislated by government, so as to increased revenue for the fiscus. Revenue collected from this 'optimal' level of taxation should be channelled into mechanisms which effectively decrease the excessive consumption of alcohol and tobacco and by extension the negative externalities associated thereto, particularly those resulting in low income earning communities

The Philippine government evidences a good example of the correct application of sin tax levies. As will be discussed, the Philippine government has evidenced the apt allocation, to both increasing fiscal revenue for the Philippine government as well as

¹⁵⁴ n 140 above.

addressing the excessive consumption of alcohol and tobacco and by extension the negative externalities particularly in low income earning communities or rural Philippines. The following discussion analyses the sin tax model in the Philippines and concludes with learnings for the South African sin tax model.

4.4 Sin taxes in the Philippines

Extensive efforts relating to the implementation of tobacco prevention policies - aimed at addressing negative externalities associated with the excessive consumption of tobacco - are contained in the WHO Framework Convention on Tobacco Control (FCTC).¹⁵⁵ In 2005, the Philippines government ratified the application of this framework to their sin tax model which accelerated the reduction of tobacco consumption of in the Philippines, particularly in low income earning or rural areas.¹⁵⁶ The ratification and application of the abovementioned framework resulted in sin tax levy increases on commodities such as tobacco and alcohol in addition to the passing of the Sin Tax Reform Bill in 2012.¹⁵⁷ Sin tax levies on tobacco and alcohol continue to increase annually upon the review and evaluation by policy makers.¹⁵⁸ This evaluation is based on balancing revenue collection goals, the economic efficiency of sin taxes and the effects that increased sin tax levies may have on producers of alcohol and tobacco and those who work in those industries.

4.4.1 Revenue generation and allocation

Robust focus on sin taxes since the year 2012 with the passing of the Sin Tax Reform Bill, raised in the excess of USD 1.2 billion for the Philippine government. Revenue allocated towards the health care system resulted in an additional 14 million Philippine families receiving healthcare assistance, additionally an increase of 82 per cent of Philippine citizens receive coverage from a much improved national health

¹⁵⁵ WHO Framework Convention on Tobacco Control (2003). See <http://www.who.int/fctc/en/> (accessed 15 September 2017).

¹⁵⁶ See <http://apps.who.int/fctc/implementation/database/parties/Philippines> (accessed 15 September 2017) detailing various dates upon which countries ratified the WHO Framework Convention on Tobacco Control. As per the 'Implementation Database' the WHO Framework Convention on Tobacco Control was ratified by the Philippine government on 6 June 2005.

¹⁵⁷ n 156 above.

¹⁵⁸ See <https://thoughtsyours.wordpress.com/2013/01/19/philippines-sin-tax-bill/> (accessed 17 September 2017).

insurance.¹⁵⁹ Jeremiah N. Paul, secretary at the Philippine Department of Finance, stated that taxes on alcohol and tobacco are used by the Philippine government as a mechanism of effectively addressing health care negative externalities associated with the excessive consumption of alcohol and tobacco. Hence an increased focus in the healthcare system, which he remarked was ‘a win for the poor who would not be able to afford healthcare otherwise’.¹⁶⁰

In FY 2016, 15 per cent of revenue derived from sin tax levies was allocated toward programmes that assist tobacco farmers and workers to find alternative livelihood,¹⁶¹ showing that the Philippine government strives to implement tax policies which foster a growing tax base (as discussed above). This balanced allocation of revenue generated from sin tax levies into viable sectors, such as the health care sector, no doubt enable the Philippine health care sector to implement strategies that will reduce negative externalities associated with the excessive consumption of alcohol and tobacco.

4.4.2 Sin taxes and health

About 85 per cent of revenue derived from sin taxes is allocated to the Philippine healthcare system, which revenue was subsequently allocated to the upgrading of medical facilities and the training of hospital personnel.¹⁶² WHO representatives in the Philippines, such as Dr Julie Lyn Hall, concede that sin tax levies on tobacco have discouraged a number of consumers from taking up the habit and has ‘contributed to a decrease in the number of existing tobacco consumers’.¹⁶³ A National Nutrition Survey conducted in the Philippines found that tobacco consumption amongst adults aged 18 or older, had since decreased by 5.6 per cent.¹⁶⁴ As aforementioned, the noticeable decrease in the consumption of tobacco and tobacco related substances was largely attributed to the introduction of sin tax levies and the adequate utilisation of the revenue generated therefrom in education driven avenues that have thus resulted in a decrease therein. An additional survey conducted between December 2012 and March 2014 with

¹⁵⁹ See article entitled “‘Sin tax’ expands health coverage in the Philippines” <http://www.who.int/features/2015/ncd-philippines/en/> (accessed 17 September 2017).

¹⁶⁰ n 156 above.

¹⁶¹ n 156 above.

¹⁶² See <http://www.who.int/features/2015/ncd-philippines/en/> (accessed 17 September 2017).

¹⁶³ n 155 above.

¹⁶⁴ See “Global Adult Tobacco Survey” (GATS) (2010) http://www.who.int/tobacco/surveillance/2009_gats_report_philippines.pdf (accessed 15 September 2017).

respect to adults who consume tobacco, aged 18 or older showed a decrease of 3 per cent.¹⁶⁵ Suffice to say that these results have conversely decreased the pressure on the national health care system in the Philippines, when opining on the negative results that result from the excessive consumption of tobacco, as discussed *supra*.

4.5 Conclusion

From the above discussion of the sin tax model in the Philippines it is evident that the principles of responsible taxation (evidenced by the optimal use of the revenue generated from sin taxes) is pursued by the Philippine sin tax model. Additionally, revenue generated from sin taxes is being adequately channelled or ring-fenced for use by the Philippine health care system as a means of addressing the negative externalities associated with the excessive consumption of alcohol and tobacco. This indicates that the various Philippine governmental departments are correctly positioned to address challenges arising from the excessive consumption of alcohol and tobacco – which is a notable government achievement.

A hybrid match between improving health care departmental abilities and addressing negative externalities associated with the excessive consumption of alcohol together with a sin tax model that generates fiscal revenue is favourable. Although sin tax increases are effected annually, the Philippine government effects sin tax increases upon evaluation of the predominant pillars of taxation, more specifically the economic efficiency tenet of taxation). This is evidence that increases are not arbitrarily made solely for revenue generation reasons, but are effected, cognisant to factors such as the economic efficiency of sin taxes, tax base growth and pursuing an adequate tax structure.

This can be contrasted with the South African sin tax model whereby increases in sin taxes are effected annually at a rate above inflation,¹⁶⁶ thus fuelling negative results such as illicit trade and the consumption of alternative substances,. These negative consequences result in a further burden upon the South African health care system. The preceding chapter discussed the foremost principles or tenets of taxation. Although these principles are of equal importance, the three foremost principles of taxation that find application to the manner in which the South African sin tax model is structured

¹⁶⁵ n 156 above.

¹⁶⁶ n 46 above.

are namely; the principle of economic efficiency, flexibility and equality. Provided that the South African sin tax structure can adequately inculcate these principles in the current sin tax model, the regressive nature of sin taxes becomes excusable. Below is a succinct discussion on the manner in which these three principles or tenets of taxation should be inculcated into tax law policy relating to sin taxes, more specifically the sin tax structure that affects low income-earning communities such as the Eastern Cape.

An economic efficient tax¹⁶⁷ is a tax that is cognisant of the economic decision making capacity of a particular group of people who are effected by the proposed or intended tax rate. Thus, a tax rate should not be too excessive so as to unduly influence economic decision making. Economic research presented in the preceding chapter (chapter 3 *supra*), concerning the consumption patterns of those who excessively consume tobacco and alcohol products indicated that annual increases in sin taxes could result in negatively influencing household expenditure. Therefore, a general sin tax, which increases annually without regard for the actual tax base particularly in low income earning areas, indicates to the regressive nature of sin tax levies and cannot be seen as an economically efficient tax.

Secondly, the principle of flexibility¹⁶⁸ envisages a tax rate or system that can easily adjust in response to changing economic circumstances. When considering the current economic climate which is prevalent in South Africa (i.e. the growing unemployment rate in South Africa) as well as the effect that this general climate may have on the economic income base of low income earners in areas such as the Eastern Cape, it is not inconceivable to infer that the economic circumstances of those in low income earning communities tend to decrease and change over time. Thus sin taxes which increase annually above inflation, cannot be construed as a flexible tax rate when considering the example mentioned *supra*. Granted, this is not the case when considering the circumstances of consumers of alcohol and tobacco in more affluent income earning areas such as Gauteng and the Western Cape. However, the inference can be drawn that this latter group would not adversely impact or burden state resources such as the South African health care system. Thus, when considering the

¹⁶⁷ n 140 above.

¹⁶⁸ n 142 above.

implementation of tax rates that affect taxpayers in low income-earning communities, a flexible tax rate or tax model should be pursued by policy makers.

Lastly, the principle of an equitable tax rate or tax system envisages a tax rate or system that is imposed or is applied in accordance to one's taxable ability and capacity. Again, sin taxes (which are levied in a progressive manner) levied on the income of ardent consumers of alcohol and tobacco in more affluent income earning communities can be construed as an equitable tax due to the inference that the economic base of consumers in those areas increases overtime and can thus sustain the annual progressive levying of sin taxes. This is contrasted to the economic base of ardent consumers of alcohol and tobacco in low income earning communities, whereby the inference can be drawn regarding the fact that the economic base of consumers in those areas does not increase parallel to the progressive increase(s) in sin tax, which are effected above inflation on an annual basis. Although it can be said that a general progressive increase in sin taxes does not reflect the principle of an equitable tax (given that these annual increases are made generally, without due regard for the taxable ability of ardent consumers of tobacco and alcohol in low income earning communities) the very nature of sin taxes can be construed as being selective in nature. As such, although sin taxes do not forthrightly evidence the taxation tenet of equity, this cannot be construed as regressive, particularly upon consideration of the nature and context within which sin taxes are levied.

Additionally, a direct link between revenue generated from sin taxes and the adequate application of this revenue into avenues which address these negative externalities is not evident, given the commentary presented in chapter 2 and the dire state of public hospital.¹⁶⁹ Commentary regarding the Philippine health sector above, outlines how the generated revenue from sin taxes is effectively utilised in the healthcare sector. Indicating that exorbitant increases in sin taxes may not necessarily be the best

¹⁶⁹ A detailed exposition of the state of public hospitals is not canvassed in this dissertation. However, readily available information regarding the lack of adequate health care services and an over-burdened public health care system which continues to fail the greater public which largely relies thereon has been a topic of many academic works. Notwithstanding, that an average of 8.5% or the equivalent R3 billion of the South African gross domestic product is alluded to be spent on healthcare (as per the National Treasury, Inter-governmental Fiscal Reviews – Provincial Budgets and Expenditure Review: 2010/11 – 2016/17), further research has shown that an average of 84% of the South African population (who carry a greater burden of disease) depend on under-resourced public hospitals (see Blecher M, Kollipara A, de Jager P, Zulu N Health Financing and South Africa Health review 2011 29). See also <https://www.health-e.org.za/wp-content/uploads/2016/05/South-African-Health-Review-2016.pdf> (accessed 2 June 2018).

mechanism to address social ills associated with the excessive consumption of alcohol and tobacco, if generated revenue therefrom is not adequately channelled into avenues that would address and subsequently decrease the excessive consumption of alcohol and tobacco. Admittedly, sin tax is a largely regressive tax that does not *prima facie* evidence the principles of a good taxation policy – and can therefore not be said to be in line with the South African taxation model - which is favours progression. Notwithstanding that, insofar as revenue generated from sin tax levies is adequately used in various sectors such as health care sector- for example, by equipping the health care sector to address the negative externalities associated with the excessive consumption of alcohol and tobacco, this could be seen as a possible justification of the regressive characterisation of sin tax.

The concluding chapter includes recommendations as to how the South African sin tax model could be modified in order to minimise the detrimental effects that result from the excessive increases in sin taxes (particularly in low income earning/ rural communities). The concluding chapter also comments on the appropriateness of sin tax as a mechanism of addressing negative externalities associated with the excessive consumption of alcohol and tobacco.



Chapter 5- Recommendations and conclusion

5.1 Recommendations

The South African taxation system favours a progressive tax structure, as noted in the National Treasury Budget review delivered in 1994. A progressive tax structure is one whereby the tax base upon which tax is levied increases simultaneously to the tax rate that is levied. As discussed in Chapter 3, a perfect world of taxation does not exist and certain tax levies, although regressive in nature may yield better or adequate revenue generation results. A regressive tax is one whereby the tax base decreases or remains relatively the same although tax rate levies thereon continuously increase. Given the nature of regressive taxation, a regressive tax rate is not favoured by many governments and is notably not favoured by the South African government given the past economic and political climate which characterized South Africa, prior to the ushering in of the final Constitution in 1996, thus necessitating adequate expenditure of revenue derived from regressive taxes.

Consider the following scenario that evidences the negative effects of a regressive tax (i.e. sin tax) which is based on the assumption that the tax base does not increase as sin tax levies increase. Heavy consumers of alcohol and tobacco (particularly those in low income earning communities) may be faced with two divergent consumer choices because of annual sin tax increases. Firstly, a heavy consumer of alcohol or tobacco who is not price sensitive, could elect to use their economic income base to purchase alcohol and tobacco thus forgoing meritorious household expenditure. This could result in increasing the poverty already experienced by those living in low income earning communities, as evidenced in the case study of the Eastern Cape, which could ultimately exacerbate the negative externalities as discussed in chapter 3 *supra* and result in a decrease in the tax base. Furthermore, the extensive consumption of alcohol and tobacco by persons in low income earning communities can result in placing a further burden on the South African healthcare system.

The second scenario envisages a heavy consumer of tobacco and alcohol who is price sensitive, opting to consume illicit tobacco and alcohol products due to the affordability thereof. Although the tax base in this scenario remains relatively the same, the results of consuming alternative substances may again have adverse effects on the South

African health care system. Clearly, the impact of annual increases in sin taxes, particularly on low income earning/rural communities, has perverse effects and does not pursue the intended tax structure envisaged by the South African government. The effects of the sin tax policy in low income earning/rural communities, pervert governmental efforts to improve the quality of life in these areas and may impact negatively and further burden the South African healthcare sector. Thus, it is submitted that the current functioning of a general sin tax, which increases annually above inflation, is not an effective tax policy, particularly regarding the effects that annual sin tax increases have in low income earning communities and should thus be modified. This modification is in fact possible, given the fact that even South African courts have taken to re-visit past court judgments when it becomes evident that the need arises.

Similar to the Philippine sin tax model, a proportional tax structure is recommended to address the above two scenarios. A proportional tax structure envisages that the tax rate levied upon income remains relevantly the same, or increases in proportion to the tax base or economic income. This necessitates the need to evaluate the tax base and economic income upon which the tax rate is levied, particularly considering that an expanding tax base and growing economic income is an essential component for levying tax. Although extensive economic detail was not presented in this dissertation with respect to income actually earned in low income earning/rural communities, suffice to say that income earned by persons living in low income earning communities (i.e. rural areas or poverty stricken communities) does not contribute towards a large tax base.

Although the South African government favours a marginal, progressive tax rate, regard must be given to the varying economic income earnings of South African citizens who have elected to consume alcohol and tobacco. Therefore, general or 'blanket' sin tax levies cannot be construed as adequate when considering these various economic income bases upon which sin taxes are levied.

A proportional sin tax, may yield better results and prevent the negative results associated with the current annual increases in sin taxes, which are evident in low income earning communities. This in turn may result in decreasing the amount of expenditure (i.e. such as the expenditure allocated to the health care sector) that is utilised towards remedying the adverse health effects that are yielded by the excessive

consumption of alcohol and tobacco by persons who rely on the state and state resources to remedy these effects. For example, extensive economic research should be conducted in various communities to determine the actual tax base/ economic income of these communities. Upon consideration of the results of the proposed economic research that will be presented, when considering increases in sin taxes, policy makers should ensure that an adequate balance between revenue generation objectives and facilitating the growth of the applicable tax base is achieved. This could potentially result in a decrease of the negative externalities associated with the excessive increase of sin taxes in low income earning/rural areas (such as the consumption of illicit products and fuelled negative socio-economic results discussed *supra*). Granted, revenue-generating objectives should be foremost in driving government budget incentives so as to achieve government goals, however, it is therefore submitted, that a proportional tax rate be applied when considering sin tax levies and increases, particularly taking into consideration varying economic income bases and the effect that excessive sin tax levies may have thereon. This may be a laborious task for the National Treasury; and the SARS, however, given the negative effects associated with increasing sin tax levies, this should not be viewed as inconceivable, because such an exposition will be to the greater benefit of both South African citizens (i.e. decreasing negative externalities) and the national fiscus (i.e. decreasing the amount of expended state resources allocated to addressing the effects yielded by the excessive consumption of alcohol and tobacco).

5.2 Conclusion

This dissertation set out to discuss the constitutional validity of sin taxes and whether sin taxes can still retain its characterisation in accordance to our current constitutional dispensation. This dissertation also considered commentary regarding the fact that sin taxes and excessive increases therein can be construed as a means of limiting the listed right to freedom of conscience as contained in the Section 15 of the Constitution.

This dissertation has concluded that levying and increasing sin taxes serves a legitimate government purpose – that of revenue generation and the goal of discouraging the excessive consumption of alcohol and tobacco, by reducing the accessibility thereof. However, due regard must be given to the actual effects yielded by excessive sin tax levies particularly in low income earning/rural communities such as the Eastern Cape. Amongst others, realities such as illicit trade and the consumption of alternative

substances due to price sensitivity, largely retard government healthcare initiatives and goals.

A commonly quoted phrase by the late Albert Einstein says that the definition of ‘insanity is doing the same thing over and over again but expecting different results’.¹⁷⁰ This dissertation has explored how the excessive increase in sin taxes (i.e. as evidenced in the study of the Eastern Cape in Chapter 4 *supra*) is becoming a redundant mechanism for addressing negative socio-economic externalities associated with the excessive consumption of alcohol and tobacco, particularly in low income earning/rural communities (if that is indeed still a government objective for the levying of sin tax). This is evident in the fact that year-on-year an all too common feature of the Budget Speech presented by the Minister of Finance is with regard to increases in sin tax levies.

From the studies mentioned in this dissertation, it can be preliminarily concluded that annual increases in sin tax may not be the best vehicle to address and discourage the excessive consumption of alcohol and tobacco, this therefore necessitates the need for the South African government to re-consider other mechanisms of redress in this respect. As it stands, general increases in sin taxes signify that revenue generation is the sole motivating factor for the South African government.

In light of the above, it is proposed that increases in sin taxes in low income earning/rural communities should not be effected above inflation. Increased evidence of a correlation between revenue generated from sin tax and addressing negative externalities of the excessive consumption of alcohol and tobacco should be increasingly visible (i.e. increased expenditure on initiatives that directly relate to addressing the negative effects of the excessive consumption of alcohol and tobacco). As is the case of the Philippine National Health Care system, the South African health care sector should take increasing responsibility for addressing the results associated with the excessive consumption of alcohol and tobacco (such as education initiatives facilitated by state owned clinics and hospitals). Discouraging negative consumption patterns should not be the sole responsibility of the South African taxation system (by means of sin tax levies and increases), even though revenue generated therefrom is notable.

¹⁷⁰ See https://www.brainyquote.com/quotes/unknown_13391 (accessed 4 November 2017).

To reiterate the remarks made above, even though the reason for levying sin taxes can be viewed as constitutionally valid a review of the actual results yielded by excessive increases in sin tax is recommended, particularly in low income earning communities such as, but not limited to the Eastern Cape. Until the point where sin tax levies and increases are made in proportion to the actual income base of varying economics group, sin tax policy will continue to stand in contradiction of the intended government purpose of progressive taxation and will continue to retard government growth initiatives in communities which are in dire need thereof.

In addition to sin taxes being levied on a *proportional* basis, it is recommended that revenue derived from sin taxes, should be *ring-fenced* and used solely for education purposes (preferably facilitated by the South African health care sector). Ring-fencing revenue generated from sin taxes in this manner, so as to address and educate communities (particularly those who rely on state owned resources to remedy the effects of their tobacco and alcohol addictions) about the negative externalities resulting from the excessive consumption of alcohol and tobacco and thus potentially decreasing these negative effects, could potentially result in a decrease of the excessive consumption of tobacco and alcohol and a decrease in the negative externalities associated with the aforementioned excessive consumption.

Granted revenue generated from sin tax levies have has served a purpose. It would however, be more prudent for increased revenue derived from sin tax levies to be used solely in initiatives and policies set by the South African health care sector in order to educate ardent consumers of tobacco and alcohol of the actual effects of the excessive consumption of these commodities. More specifically, the proposition that a concerted partnership between the South African health care sector and the role that sin tax policies play in society be increasing interconnected in order to ensure that government objectives of deterring undesirable behaviour are achieved. A revision of the sin tax model in this manner may potentially decrease the excessive consumption of alcohol and tobacco and may potentially increase the economic income of those who previously consumed these products. Which may in turn increase the tax base of these consumers and foster economic growth within the Republic of South Africa.

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